EXHIBITS
WT DOCKET NO. 17-79

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling	)	WT Docket No. 16-421

COMMENTS OF THE CITIES OF SAN ANTONIO, TEXAS; EUGENE, OREGON; BOWIE, MARYLAND; HUNTSVILLE, ALABAMA; AND KNOXVILLE, TENNESSEE

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Table of Contents

The Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee (collectively, "Cities"), submit these comments in response to the Commission's Public Notice in this docket.

I. INTRODUCTION AND SUMMARY.

The Public Notice seeks comments on "potential Commission actions to help expedite the deployment [of] next generation wireless infrastructure."[1] The Commission also seeks comment on the issues raised by Mobilitie, LLC ("Mobilitie") in its Petition for Declaratory Ruling.[2]

Each of the Cities already acts to promote broadband deployment through all technologies. But unlike the Commission, the Cities must also consider and balance factors other than the needs of broadband providers; they must consider public safety, right-of-way ("ROW") capacity and congestion, unique local historic and scenic neighborhoods and parks, and the obligation that taxpayers receive adequate compensation for private commercial use of public property.

We therefore caution strongly against any FCC attempt in this proceeding to develop nationwide, one-size-fits-all standards for local processing of or action on small cell/DAS facility applications. Such standards would not in fact promote deployment, but would instead increase public safety risks, undermine the public's investment in the ROW, and thwart each municipality's ability to protect unique local attributes.

San Antonio, Eugene, Bowie, Huntsville, and Knoxville are a geographically, topographically and historically diverse group of local governments, and each has its own,

[1] FCC, Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies 1 (Dec. 22, 2016) ("Public Notice").

[2] *In re Promoting Broadband for All Ams. By Prohibiting Excessive Charges for Access to Pub. Rights of Way*, Petition for Declaratory Ruling (Nov. 15, 2016) ("Mobilitie Petition").

different experiences with wireless providers and siting processes. All share the goal of promoting the widespread availability of wireless services to their residents, businesses, and visitors. But that is not, and cannot be, the Cities' only goal. Nor should the Commission, either in this proceeding or elsewhere, hamstring the ability of local governments to respond to each of their unique ROW, land use, public safety, and public property needs and interests. No provision of the Communications Act authorizes such heavy-handed FCC intrusion into local affairs.

A. DESCRIPTION OF THE CITIES.

San Antonio, with approximately 1.3 million residents, is the second largest city in Texas, and the seventh largest city in the nation. Both landline and wireless broadband from multiple competitive providers are available throughout San Antonio. In fact, both landline and wireless broadband are far more ubiquitously and competitively available in San Antonio than in many, especially rural, areas across the nation with far less demanding, and in some cases nonexistent, ROW and zoning requirements. At the same time, pursuant to Texas law and the City Charter, San Antonio has, for over a century, imposed rent-based compensation on private entities that install facilities in the City's ROW, including ROW use by telecommunications, cable and broadband providers (among others). Indeed, ROW compensation from private sector telecommunications and cable providers is the third-largest source of City revenue, exclusive of the City's municipal utilities.

San Antonio has long recognized and promoted the benefits of broadband and wireless development; it has granted hundreds of collocation requests and has approved the installation of DAS and small cells. But the City also must balance its promotion of the deployment of these technologies with preservation of its rich historic resources. San Antonio has over 2000 individual landmarks, 27 different locally designated historic districts, 19 sites on the National

Register of Historic Places, and five historic missions with pending designations as UNESCO World Heritage Sites. The City has over 28 million visitors a year, and tourism is a significant part of the local economy. Because of the City's unique character and history, all building and other structural alterations (including wireless facilities) in historic and riverfront areas are subject to review and approval. Exhibit 1, attached, displays some of these historic and riverfront resources, as well as the incorporation of a small cell tower along San Antonio's Riverwalk.

Eugene is Oregon's second largest city, encompassing approximately 41.5 square miles, and home to over 160,000 people.[3] The City has a high percentage of professionals, with over one-third of the City's population having completed four or more years of college. Eugene is home to several colleges and universities, including the University of Oregon. Eugene's parks and open spaces provide tangible benefits to the City in areas such as water quality, flood protection, air quality, property values, and recreation.[4] The City's pristine viewsheds are protected under the City code, [5] which was amended in light of the Telecommunications Act of 1996 regarding the siting of wireless facilities.[6]

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[3] *About Eugene*, https://www.eugene-or.gov/1383/About-Eugene (last visited Mar. 6, 2017); QuickFacts: Eugene City, Oregon, https://www.census.gov/quickfacts/table/PST045215/4123850 (last visited Mar. 8, 2017).

[4] Earth Economics, *Nature's Value: An Economic View of Eugene's Parks, Natural Areas and Urban Forest* 2 (2015), https://www.eugene-or.gov/DocumentCenter/View/18659.

[5] *See* Exhibit 2 (attached) (showing Eugene and the viewshed protection of the vistas of Spencer Butte).

[6] In this regard, the City Code provides:

> Viewshed. The transmission tower shall be located down slope from the top of a ridgeline so that when viewed from any point along the northern right-of-way line of 18th Avenue, the tower does not interrupt the profile of the ridgeline or Spencer Butte. In addition, a transmission tower shall not interrupt the profile of Spencer Butte when viewed from any location in Amazon Park. Visual impacts to prominent views of Skinner Butte, Judkins Point, and Gillespie Butte shall be minimized to the greatest extent possible. Approval for location of a transmission tower in a prominent view of these Buttes shall be given only if location of the transmission tower on an alternative site is not possible as documented by application materials submitted by the applicant, and the

Eugene has adopted and consistently applied its land use, zoning and ROW access ordinances, rules and policies in a manner designed to promote wireless and landline broadband infrastructure deployment while, at the same time, preserving the City's historic and aesthetic integrity, public safety, and fair and adequate compensation for use of City ROW and other property. Since the late 1990s, the City's land use code has contained provisions specifically encouraging collocation on existing towers, buildings, light or utility poles, and water towers.[7] Since adopting its wireless zoning ordinance in 1997, the City has granted over 240 wireless siting applications. Eugene typically works with an applicant until the designs requested are appropriate, safe, and lawful, and the process rarely gets to the point of needing to officially deny an application. AT&T has commended the City on its wireless siting permit procedures. *See* Exhibit 3, attached.

Bowie, located in Prince George's County, is Maryland's fifth largest city, with approximately 55,000 residents.[8] In convenient proximity to Baltimore, Annapolis, and Washington, D.C., Bowie encompasses about 18-square miles, which includes 1,100 acres set aside as parks or as preserved open space. Bowie has over 22 miles of paths and trails, and 75 ball fields. Numerous institutions of higher education and government facilities are located near Bowie. According to the Census Bureau's American Community Survey of 2012, 46% of Bowie's adult residents have a bachelor's degree or higher. The County, not the City, has land use authority covering the siting of wireless facilities on private property within the City. The City, however, has leased portions of its property to wireless providers since the 1990s, and there

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> transmission tower is limited in height to the minimum height necessary to provide the approximate coverage the tower is intended to provide.

Eugene, Or., Code § 9.5750(7)(j).

[7] *See id.* § 9.5750.

[8] *About Bowie*, http://www.cityofbowie.org/95/About-Bowie (last visited Mar. 6, 2017).

are currently thirteen wireless facilities installed on City property, all pursuant to lease agreements between the provider and the City. The City recently adopted an ordinance addressing the installation of small cell/DAS facilities in the ROW.

Huntsville, the seat of Madison County, is the fourth-largest city in Alabama with a population of approximately 180,000.[9] Within the Huntsville area, residents enjoy more than 27 miles of existing greenways and trails, as well as access to the Tennessee River, with an adopted Greenway Plan guiding the development of over 180 miles of interconnected canoe, pedestrian, biking, and hiking trails.[10] Technology, aerospace, and defense industries have a strong presence in Huntsville, with the Redstone Arsenal, NASA Marshall Space Flight Center, and Cummings Research Park ("CRP") located nearby.[11] As a city of professionals, nearly 40% of the City's adult population has completed four or more years of college, and there are a number of colleges and universities serving the Huntsville area, including the University of Alabama in Huntsville and Alabama A&M University.[12] Thanks to its highly educated, motivated and skilled workforce, Huntsville has been and continues to be "forward-looking." The continued presence and commitment of the aerospace and defense industry in the area and the development of new industry (including biotech, biomedical, and pharmaceutical), as well as the research parks and

[9] *Facts & Figures*, https://www.huntsvilleal.gov/business/city-of-huntsville/facts-figures-about-huntsville/ (last visited Feb. 28, 2017).

[10] Huntsville, Alabama, *Trails & Greenways*, https://www.huntsvilleal.gov/environment/parks-recreation/parks-and-nature/trails-greenways/ (last visited Feb. 28, 2017).

[11] *Facts & Figures*, https://www.huntsvilleal.gov/business/city-of-huntsville/facts-figures-about-huntsville/ (last visited Feb. 28, 2017).

[12] QuickFacts: Huntsville City, Alabama, https://www.census.gov/quickfacts/table/PST045216/0137000 (last visited Mar. 6, 2017).

educational institutions, all support—and in some cases even demand—advanced communications capabilities.[13]

Huntsville is not only forward-looking, it is also mindful of its past. The National Trust for Historic Preservation named Huntsville to its "2010 List of America's Dozen Distinctive Destinations."[14] Richard Moe, president of the National Trust for Historic Preservation, has said: "Huntsville has beautifully preserved and protected so many of the diverse stories of its past, from its southern culture and heritage to its role as 'America's Space Capital', and its citizens are not stopping there . . . . This designation recognizes not only their commitment to the past, but also their dedication to a sustainable future."[15]

Knoxville is Tennessee's third-largest city,[16] home to approximately 180,000 people,[17] and is the seat of Knox County. The City covers 104 square miles, and is situated in a valley between the Cumberland Mountains and Great Smoky Mountains.[18] The City is home to 83 parks and approximately 2,000 acres of park land,[19] and features 18 miles of downtown

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[13] A brochure about Huntsville's CRP, "one of the world's leading science and technology parks," notes: "CRP companies demand access to a dependable, state-of-the art telecommunications network. Huntsville was the first metro area in the USA to establish 100% digital switching and transmission facilities, and CRP companies are still among the first in the nation to access new telecom technologies." *In re Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Reply Comments of the City of Huntsville, Alabama 3 n.6 (Sept. 30, 2011).

[14] *Id.* at 3 & n.8.

[15] *Id.* at 3-4 & n.9.

[16] *Demographics*, http://www.knoxvilletn.gov/visitors/knoxville_info/demographics/ (last visited Feb. 27, 2017).

[17] Conventions, Sports & Leisure International, *Market and Feasibility Analysis of the Knoxville Civic Auditorium and Coliseum: Appendix G, Key Demographic Metrics* G-1 (Dec. 17, 2015), http://www.knoxvilletn.gov/UserFiles/Servers/Server_109478/File/PublicAssemblyFacilities/kcacstudy/KCACReportAppendixG-KnoxvilleDemographics.pdf.

[18] *Demographics*, http://www.knoxvilletn.gov/visitors/knoxville_info/demographics/ (last visited Feb. 27, 2017).

[19] *Parks*, http://www.knoxvilletn.gov/government/city_departments_offices/parks_and_recreation/parks/ (last visited. Feb. 27, 2017).

greenways along and nearby the Tennessee River.[20] Nearly 30% of Knoxville's adult population has completed four or more years of college, while nearby Oak Ridge is home to one of the Department of Energy's seventeen National Laboratories, and Knoxville houses the main campus of the University of Tennessee.[21] The Development Corporation of Knox County encourages business development within the area, highlighting Knoxville's status as the nation's tenth-best city in which to do business, according to rankings released in 2008 by *Forbes* magazine.[22]

Knoxville and Knox County have a Wireless Communications Facility Plan that lists historic districts and sites, scenic vistas, and public parks as locations to avoid. If a wireless facility is to be located in any of these areas, collocation and stealth design requirements are required. There are currently 200 free-standing towers in Knox County equipped with cellular antenna rays. Of these towers, 5 are in the Town of Farragut, 73 are in the City of Knoxville, and 120 are in the unincorporated portion of the County.

B. EXPERIENCES AND INTERESTS OF THE CITIES.

Having long recognized the importance of promoting wireless and landline broadband infrastructure and service as a critical component of economic growth and development, the Cities have long supported the deployment of broadband. But the Cities strongly disagree with the apparent premise of both the Mobilitie Petition and the Public Notice that local government

[20] Kathleen Gibi, Greenways Add Options for Pedestrians and Bicyclists, Knoxville Parks & Recreation Guide, Oct. 22, 2015, at 5, http://knoxvilletn.gov/UserFiles/Servers/Server_109478/File/ParksRecreation/RecreationGuide2015.pdf.

[21] *Know Knoxville: Relocation*, http://www.knoxvillechamber.com/relocation (last visited Mar. 6, 2017).

[22] The Development Corporation of Knox County, *Knox County Profile: Commerce and Industry*, http://www.knoxdevelopment.org/CountyProfile/CommerceandIndustry.aspx (last visited Feb. 27, 2017).

wireless siting and ROW practices have represented any significant obstacle to the deployment of small cell/DAS or any other wireless facilities requiring Commission intervention at this time.

The Cities note their experience with incomplete or otherwise deficient applications slowing down (or preventing) deployment. Eugene, for example, has experienced delays in moving forward with applications due to changes in the applicant's staff contacts (accompanied by reorientation of newly assigned applicant staff) and applicant delays in responding to the City's requests about planned business operations. These requests have included such basic matters as seeking information about what legal entity will own the planned infrastructure, and what is the lawful name of the company seeking use of the ROW or the City's poles. Applicants are sometimes reluctant to provide the requested information to complete their application packages. These delays have impacted the City's development and finalization of master lease agreements with providers for use of ROW and City-owned poles for small cell/DAS installations. Additionally, in Eugene's experience, the applicant will often be quick to blame the City for delays when the delay is actually attributable to lack of information transfer taking place within the applicant's corporate offices.

The Cities also illustrate their own innovative developments to promote wireless technology deployment. For example, Eugene is in the process of reviewing concept plans for a standardized design for small cell/DAS attachments to be considered for collocated placement on City street light and traffic signal poles. Eugene anticipates that this standardized design, which will be required for use by all small cell providers seeking to attach to City poles, will help streamline the permitting process, as well as meet the City's aesthetic goals, by providing a consistent appearance for these types of installations in the ROW.

Knoxville, in conjunction with Knox County, is also in the process of adopting small cell/DAS guidelines to be used to review small cell/DAS projects in the ROW. And staff from the Knoxville-Knox County Metropolitan Planning Commission, the City of Knoxville, and Knox County are working to update the wireless communications ordinance for the City and County, which will include provisions for small cell/DAS on private property. The City has entered into license agreements with several companies for installing underground fiber backbones in the City and is in the process of creating an agreement for overhead facilities.

As noted above, Bowie recently adopted an ordinance amending its code to permit, under certain circumstances, the installation of wireless facilities in the ROW.

The Cities have had varied experiences with wireless siting providers and procedures. Generally, the Cities have approved applications to construct wireless facilities, often expending uncompensated municipal staff and other resources to work cooperatively with applicants. And some of the Cities have developed, or are in the process of developing or revising, procedures to best promote the deployment of small cell/DAS technology in their jurisdictions while, at the same time, protecting public safety and local land use interests and obtaining adequate compensation for private commercial use of public property. Local governments are motivated to expedite deployment, finding ways that will work best given unique local circumstances and concerns.

And that point warrants emphasis: Each City, like each community nationwide, has unique topography, history, land use concerns, state law requirements, ROW infrastructure, and municipal property. As a result, any federalized "one-size-fits-all" approach to small cell siting—or indeed, any form of commercial facility siting—would be counterproductive. In the experience of the Cities, the application process is often positive and cooperative, and when there

is delay, it is most likely to be on the applicant's end, not the Cities'. Moreover, the FCC's past intrusions in this area have not been helpful to applicants or local governments. After the Commission's 2009 *Shot Clock Order,*[23] many local governments had to implement more rigid wireless siting application procedures to ensure that an application is complete within the window dictated by the FCC, and at least one applicant has complained about this loss of flexibility.

The promulgation of additional rigid nationwide rules to attempt to control continuously evolving local processes would threaten the progress made by local governments, such as the Cities. And that could lead to more, not less, litigation between municipalities and the wireless industry.

II. COMMENTS.

A. SECTION 253 DOES NOT APPLY TO LOCAL GOVERNMENT DECISIONS REGARDING THE PLACEMENT, CONSTRUCTION, AND MODIFICATION OF PERSONAL WIRELESS SERVICE FACILITIES.

The Commission cannot, as Mobilitie requests,[24] rely on Section 253 to provide the small cell/DAS industry with any additional preemptive relief regarding the siting of personal wireless service facilities. The plain language of Section 332(c)(7)(A) bars the application of Section 253 to local government decisions regarding the placement, construction, and modification of personal wireless service facilities, including small cell/DAS facilities, that are covered by Section 332(c)(7).[25]

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[23] *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling (Nov. 18, 2009) ("*Shot Clock Order*").

[24] Mobilitie Petition at 1. *See also* Public Notice at 12.

[25] The Commission did not reach this issue in the *Shot Clock Order*. *See Shot Clock Order*, ¶ 67.

1. The Plain Language of Section 332(c)(7)(A) Forbids Application of Section 253 to "Limit or Affect" Local Authority Over Wireless Siting Decisions.

The Commission made clear in its 2014 *Wireless Siting Order*[26] that small cell/DAS is a "personal wireless service," and small cell/DAS facilities are "personal wireless service facilities" within the meaning of 47 U.S.C. § 332(c)(7). Section 332(c)(7)(A) provides: "[E]xcept as provided in this paragraph, *nothing in this chapter* [*i.e.*, the Communications Act] *shall limit or affect* the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities."[27] Thus, by its terms, the limitations in Section 332(c)(7)(B) represent the Act's exclusive limitations on State and local government authority over the placement, construction and modification of personal wireless service facilities, including small cell/DAS facilities.[28]

"Nothing in this chapter" means that Section 253 cannot "limit," or even so much as "affect," state and local authority over small cell/DAS siting decisions. The provision's legislative history confirms that the purpose of Section 332(c)(7)(A) was to make clear that the limitations of Section 332(c)(7)(B) were the sole limitations on local authority over the placement, construction, and modification of personal wireless service facilities:

> The conference agreement creates a new [section 332(c)(7)(A)] which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the

[26] *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Report and Order ¶¶ 270, 271 (Oct. 17, 2014) ("*Wireless Siting Order*").

[27] 47 U.S.C. § 332(c)(7)(A) (emphasis added).

[28] To be sure, the subsequently-enacted 47 U.S.C. § 1455 (Section 6409 of the 2012 Spectrum Act) represents an exception to this rule, but that does not alter the conclusion that Section 332(c)(7)(A) bars application of Section 253 to small cell/DAS facilities.

> limited circumstances set forth in [the balance of section 332(c)(7)(B)]. [29]

Any interpretation of Section 253 as providing some additional avenue for Communications Act intrusion upon state and local authority over "the placement, construction, and modification" of small cell/DAS or other wireless facilities would fly in the face of unambiguous Congressional intent.[30]

Section 253 is a provision of general applicability to telecommunications services by its terms. It does not apply to information service or to infrastructure developers that do not actually provide telecommunications services. And where precluded by other parts of the Act — as in Section 332(c)(7)(A)—Section 253 simply does not apply, yielding to the more specific provisions in Section 332(c)(7) that cover personal wireless facilities.

2. Policy Concerns Support Not Applying Section 253 to Wireless Siting.

In addition to being contrary to Section 332(c)(7)(A)'s plain language and legislative history, extending Section 253 to reach local wireless facility siting matters falling within Section 332(c)(7)(A) would be unsound as a policy matter. There is no indication that Congress intended to favor wireless providers over all other telecommunications service providers by furnishing them—and them alone—with their own unique double set of preemptive benefits and remedies in the Telecommunications Act of 1996. When Congress intends to give additional

[29] H.R. Rep. No. 104-458, at 207-08 (1996) (Conf. Rep.).

[30] *See City of Arlington v. FCC*, 668 F.3d 229, 250 (5th Cir. 2012) ("Section 332(c)(7)(A) states Congress's desire to make § 332(c)(7)(B)'s limitations the only limitations confronting state and local governments in the exercise of their zoning authority over the placement of wireless services facilities, and thus certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of § 332(c)(7)(B)."), *aff'd*, 133 S. Ct. 1863 (2013).

protections to wireless providers and the promotion of wireless facilities deployment, it has said so explicitly, as it did in Section 6409 of the 2012 Spectrum Act.[31]

Further, ROW access, addressed in Section 253(c), has far greater relevance to landline service than the wireless service covered by Section 332(c)(7). That is, the ROW is unquestionably an essential facility for landline service, and lack of access to ROW therefore is an inherent barrier to entry for landline service. That is not so with wireless service. To the contrary, wireless facilities can be—and historically almost exclusively have been—placed on private property. Unlike landline facilities, newer, smaller wireless facilities that could be placed in the ROW have plentiful non-ROW-based alternatives: the provider could negotiate with adjacent private property owners for sites on existing buildings, collocation or modification of existing facilities on private property, or the erection of monopoles on private property. Eugene has, in fact, had more small cell/DAS applications for private property installations than for installations in the ROW.[32]

Thus, although small cell/DAS facilities *can* be placed in the ROW, providers have other facility installation alternatives that are inherently unavailable to a landline telecommunications network provider. It therefore makes sense for Section 253(c)'s concern with ROW access to apply to landline service and not to wireless service. To be sure, wireless providers may believe that, due to state law or perhaps hoped-for beneficence from the Commission in this proceeding, they may be able to obtain lower-cost, subsidized access to the ROW than they can obtain from private property owners. But nothing in Section 332(c)(7) suggests any intent by Congress to

[31] *See, e.g.*, 47 U.S.C. § 1455 (Section 6409(a) of the Spectrum Act).

[32] Eugene has had eight applications submitted for permitting wireless facilities in 2016 in the ROW, and these are the only ones submitted within the last five years (with the exception of an occasional pole contract amendment to replace an attachment).

skew the private property market for wireless facility siting by granting wireless providers federally-mandated, subsidized access to state and local ROW that does not belong to the providers or the federal government. Small cell/DAS applications seeking ROW access also confront local governments with the added complication of needing to ensure that safeguards governing the installation of additional facilities in the ROW are in place.

As an example, Maryland state law generally permits telephone companies to construct lines and erect poles supporting these lines along and on a road, street or highway, subject to consent and local franchise requirements.[33] "Wireless providers," however, are explicitly excluded from the Maryland law definition of telephone company and thus are not entitled to this privilege.[34] Small cell/DAS facility constructors, as well as personal wireless service providers, cannot have it both ways: They cannot claim the benefits of exemption from state PUC regulation under 47 U.S.C. § 332(c)(3), yet simultaneously claim the special ROW access privileges of landline service providers that do not enjoy the benefit of §332(c)(3)'s exemption from state PUC regulation.

B. SECTIONS 332(c)(7) AND 253 DO NOT APPLY TO LOCAL GOVERNMENTS ACTING IN THEIR PROPRIETARY CAPACITY.

A municipality, like any other landowner, controls the use of its own property. In the context of Section 332(c)(7), the law is clear that a decision whether or not to allow construction on a municipality's own property "does not regulate or impose generally applicable rules on the placement, construction, and modification of personal wireless service facilities . . . and so the substantive limitations imposed by [Sections 332(c)(7)(B)(i) and (iv)] are inapplicable."[35]

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[33] Md. Code Ann., Public Utilities § 8-103, § 1-101(ll).

[34] *Id.* § 1-101(ll)(2).

[35] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013) (quotation marks omitted); *see also Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of*

Indeed, neither Section 253 nor Section 332(c)(7) "preempt[s] nonregulatory decisions of a local governmental entity . . . acting in its proprietary capacity."[36] Thus, neither provision applies to small cell/DAS or other wireless requests for access to municipal buildings, towers, light poles, or utility poles. Construing Section 332(c)(7) or Section 253 to limit a municipality's ability to permit or deny access to municipal property for wireless siting would render either provision an impermissible interference with and burden on the municipality's control of its own property.[37]

Whether the proprietary exception to Sections 332(c)(7) and 253 applies to wireless requests to access the local ROW in a particular jurisdiction depends on whether or not the local ROW is subject to the municipality's proprietary control.[38] This is a matter of state or local property law concerning the status of the ROW, which varies not only from state to state, but also from locality to locality within a state, and sometimes even from street to street within a locality.[39] This is therefore not an area where there is, or legally can be, uniformity, or on which the Commission legally can or should attempt to impose uniformity. The Commission simply lacks the authority, under Section 332(c)(7) or any other provision of law, to rewrite or remold the state property law status of local ROW that belongs neither to the FCC nor any other arm of the federal government.

Mass./R.I., Inc., 507 U.S. 218, 226-27 (1993) ("When a State owns and manages property . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation*." (emphasis in original)).

[36] *Sprint Spectrum, L.P. v. Mills,* 283 F.3d 404, 421 (2nd Cir. 2002) ("[W]e conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity[.]"); *Omnipoint Commc'ns, Inc.*, 738 F.3d at 200; *see also N.Y. State Thruway Auth. v. Level 3 Commc'ns, LLC*, No. 1:10-cv-0154, 2012 U.S. Dist. LEXIS 45051, at *18-19 (N.D.N.Y. March 30, 2012) (considering proprietary exemption in the context of Section 253); *Coastal Commc'ns Serv., Inc. v. City of New York*, 658 F. Supp. 2d 425, 443 (E.D.N.Y. 2009) same).

[37] *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 335-36 (2002).

[38] Municipal decisions regarding access to other municipal property, such as light poles, are clearly proprietary activities, and accordingly, there can be no serious suggestion that either Section 332(c)(7) or Section 253 applies to those types of decisions.

[39] *See, e.g., Ill. Bell Tel. Co. v. Vill. Of Itasca*, 503 F. Supp. 2d 928, 934-35 (N.D. Ill. 2007) (discussing Illinois law concerning municipal interests in public streets).

C. THE "PROHIBIT OR HAVE THE EFFECT OF PROHIBITING" PROVISIONS OF 332(c)(7) AND 253(a) REQUIRE NO FURTHER COMMISSION INTERPRETATION.

The Commission asks whether it should "further clarify any issues addressed in its 2009 and 2014 rulings or . . . fine-tune or modify any of its past statutory interpretations in light of current circumstances."[40] The Commission notes that both Sections 253(a) and 332(c)(7) contain restrictions on a State or local governments' ability to take certain actions that "prohibit or have the effect of prohibiting" the provision of specified services.[41]

Although they use similar language, the two provisions are different in scope. Section 253(a)'s scope encompasses interstate and intrastate telecommunications services.[42] Section 332(c)(7), in contrast, encompasses only "personal wireless services."[43] And as noted above, there is another very significant difference between the two provisions: Section 332(c)(7) applies to local decisions affecting the siting of small cell/DAS facilities; Section 253 does not.

The Cities urge the Commission not to further interpret either "prohibition" provision at this time. The Commission asks, for example, if "an action that prevents a technology upgrade" has the effect of prohibiting "the provision of service."[44] But that is not a question that can be answered in a factual vacuum; it would depend upon the nature of the alleged "technology upgrade," the context of the relevant application, the size and nature of the facilities proposed, and their proposed location. This is a fact-specific inquiry best left to the courts. If the "technology upgrade" is itself a "telecommunications service" not previously provided that

[40] Public Notice at 10.

[41] *Id.*

[42] 47 U.S.C. § 253(a).

[43] 47 U.S.C. § 332(c)(7)(B)(i).

[44] Public Notice at 11.

cannot be provided at all without the upgrade, then a reviewing court might find a prohibition of service. The Commission, however, is ill-suited to address, and should not address, these kinds of intensely fact-specific and context-specific issues.

D. FCC SHOULD NOT PROMULGATE A NEW SHOT CLOCK FOR SMALL CELL SITING APPLICATIONS.

The Commission asserts that "[t]he presumptive timeframes established in the *2009 Declaratory Ruling* may be longer than necessary and reasonable to review a small cell siting request," but acknowledges that "if small cell siting applications are filed dozens at a time, those presumptive timeframes may not be long enough."[45] The Commission also seeks comment on whether there should be a different shot clock for processing a "batch" of siting requests, as well as what should qualify as a "batch."[46]

The 2009 *Shot Clock Order's* original shot clocks—one for collocations applications, and the other for non-collocation applications—were built on a "two sizes fits all" presumption. Adding yet another new and different shot clock as a presumptively reasonable time frame for small cells would directly contradict the *Shot Clock Order's* rationale that Section 332(c)(7)'s "reasonable period of time" can be reduced to a single nationwide standard. Likewise, setting yet another shot clock for batch applications would attempt to impose uniform definitions and timeframes in an area where local circumstances should control.

The Commission has already clarified in the 2014 *Wireless Siting Order* that "to the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to

[45] *Id.*

[46] *Id.* at 12.

applications related to other personal wireless service facilities."[47] The Commission should go no further here.

1. Further Federal Intrusion on the "Reasonable Period of Time" Only Highlights the Unreasonableness of Presumptive Nationwide Definitions of "Reasonable Period of Time."

A nationwide standard for "reasonable period of time" under Section 332(c)(7) is inconsistent with the statute's language and legislative history. The statutory language directs that reasonableness be evaluated "taking into account the nature and scope of such request,"[48] attributes that will, of course, necessarily vary with each request. Similarly, the legislative history clarifies that the time period would "be the usual period under such circumstances."[49] "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision."[50]

That the industry now urges the Commission to fashion still more federal shot clocks based on still more categories of siting applications shows the fundamental folly of attempting to impose presumptively reasonable nationwide timeframes onto what is inherently a local and fact-specific process. At some point, multiple FCC shot clocks go from being an interpretation of Section 332(c)(7)(B)'s "reasonable period of time" language to a Commission-imposed nationwide land use code for wireless siting, something that Section 332(c)(7)(A), as well as Section 332(c)(7)'s legislative history, make clear Congress never intended to occur.

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[47] *Wireless Siting Order*, ¶ 270.

[48] 47 U.S.C. § 332(c)(7)(B)(ii).

[49] H.R. Rep. No. 104-458, at 208 (1996) (Conf. Rep.).

[50] *Id.*

We submit Commission imposition of any new, additional, shot clocks would take us well past that point. Piling shot clock upon shot clock on local governments would serve only to create traps for unwary or resource-strapped local governments that wireless applicants would no doubt exploit for their commercial advantage. We seriously doubt this Commission would even consider imposing so many multiple and tight deadlines on the commercial communications service providers that the Act empowers it to regulate. So why should the Commission be doing that to local governments?

Moreover, a separate shot clock for small cell/DAS applications presupposes that there is a standard definition of what is a "small cell/DAS" facility. But there is not. In fact, the "small" in "small cells" refers more to the coverage area of the facility than the facility's size. Mobilitie's proposed 80 to 120-foot monopoles, for instance, are definitely *not* "small." Rather than further intruding into inherently fact-specific local matters, the Commission should respect the remaining discretion of state and local governments to meet the needs of different applications and their communities within the existing presumptively reasonable—and industry friendly—timeframes of the *Shot Clock Order*.

2. A Nationwide Definition of "Batch" Applications Would Be Unworkable and Open the Door to Gaming.

Different local governments will have different experiences with, and preferences for handling, a batched set of siting applications. The local government should be free to determine how best to treat a set of applications—whether as a set or as individual applications—because each local government is in the best position to assess its staff size and resources, and thus its ability to take advantage of potential efficiencies from the batching of siting applications. The very questions that the Public Notice asks illustrate how fact- and context-specific any

efficiencies to be gained from batch processing will be.[51] The Commission is ill-equipped to intrude on these determinations, and it would therefore be inappropriate to promulgate any binding, one-size-fits-all definition of "batch" or new presumptively reasonable timeframes for acting on "batches" of applications. The intent of the *Shot Clock Order* was to avoid an examination into the individual circumstances of the facility proposed and the proposed site. Establishing another set of shot clock rules depending on where the facilities are to be placed, the type of equipment, how many placements, or the proximity of these proposed placements to one another, would be directly contrary to that intent.

Different local governments will have different staff and budget limitations that would impact processing of applications. Bowie, for instance, has not received any "batch" submittals to date. Eugene has received five to ten applications submitted in "batch," which it handles on a first-come, first-served basis for wireless permitting in the ROW. Eugene reviews all applications on a site-by-site basis, with the time frame for a complete wireless application from review to approval anticipated to be four to six weeks. On the other hand, Knoxville has received applications from small cell providers for three or four small cell towers in the ROW, and reviewed those applications together. These experiences illustrate the varied practices of local governments in dealing with batch submittals (as well as the differences in what is considered a "batch"). Any attempt by the Commission to fashion a one-size-fits-all nationwide approach would be unhelpful at best.

[51] *E.g.*, Public Notice at 12 (asking, "Should there be multiple tiers depending on how many poles or antennas are involved?").

E. FAIR AND REASONABLE COMPENSATION UNDER SECTION 253(c) IS NOT RESTRICTED TO COST OR COST-BASED RATES.

The Commission should not attempt to construe what is "fair and reasonable compensation" under Section 253(c) here, or to adjudicate Section 253(c) ROW disputes in a vacuum. Congress intended such disputes to be left to courts, not the FCC. And for good reason: ROW compensation and management requirements necessarily reflect a balancing of several vital local governmental interests, such as public safety, efficient transportation, historical preservation, and fiscal health. This balancing is far outside the realm of the FCC's expertise.

Even if it were appropriate for the Commission to construe the meaning of "fair and reasonable compensation," Congress clearly intended that such compensation may include rent-based fees. Additionally, Mobilitie's positions to the contrary run afoul of legal and practical issues.

With regard to the separate issue of application fees, local governments incur costs that providers have shown no interest in paying, and the Commission should not intervene to erode a local government's ability to recoup the additional costs imposed upon it by wireless applicants. These costs include hours of staff-time cost in preliminary reviews and workflow processes. The "normal" permit fee typically does not cover provider-attributable delays and requests that are not, in fact, normal, and this puts a further burden on municipal public works department staffing and budgets.

1. Local Governments are Not Restricted to Cost-Based Fees by Section 253(c).

a. FCC Does Not Have Jurisdiction over 253(c) ROW matters.

As an initial matter, the Commission does not have the authority to restrict local government fees under Section 253(c). Section 253(d) gives the Commission authority to address alleged violations of Sections 253(a) and (b), but ROW matters relating to the Section 253(c) safe harbor are explicitly omitted from Section 253(d).[52] This was no accident. Rather, it was a deliberate compromise, the product of a Senate floor amendment sponsored by Senator Gorton that was explicitly intended to prevent the FCC from doing what the Mobilitie Petition proposes: to intrude into Section 253(c) ROW compensation and management matters. Specifically, "any challenge to [local ROW requirements must] take place in the Federal district court in that locality and . . . the Federal Communications Commission [should] not be able to preempt [local ROW requirements]."[53]

b. Section 253(c)'s "Fair and Reasonable" ROW Compensation Includes Rent-Based Compensation.

Even if the Commission did have jurisdiction to regulate ROW compensation under Section 253(c), the language and legislative history of Section 253(c) leave no doubt that ROW compensation need not be restricted, or closely related to, costs. Further, any such restriction would embroil courts, the FCC, local governments, and telecommunications providers in the very kinds of tedious and invasive ROW fee ratemaking proceedings that Congress intended to avoid with Section 253(c).

Section 253(c)'s plain language, "fair and reasonable compensation," certainly does not connote merely the reimbursement of costs. For example, *Black's Law Dictionary* defines

[52] 47 U.S.C. § 253(d).

[53] 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (statement of Sen. Gorton).

"compensation" as "[r]emuneration and other benefits received in return for services rendered."[54] This does not connote mere reimbursement of costs. And "just compensation" and "adequate compensation" are defined as "[usually] the property's *fair market value*, so that the owner is theoretically no worse off after the taking."[55]

An examination of other uses of similar phrases supports interpreting "compensation" to extend beyond cost-based fees. For example, the Fifth Amendment's Takings Clause contains the phrase "just compensation." The law is clear that this "compensation" means fair market value, not mere reimbursement of costs.[56] And the Takings Clause is not limited to private parties, but clearly extends to compensation to state and local governments as well.[57] In enacting Section 253(c), Congress is presumed to be aware of these interpretations of similar language.[58]

Further, longstanding precedent stands for the proposition that non-cost-based franchise fees are a permissible form of rent for private commercial use of the ROW. In the directly analogous context of cable television franchise fees, the Fifth Circuit held that the 5% franchise fee permitted by 47 U.S.C. § 542 is "essentially a form of rent: the price paid to rent use of public right-of-ways."[59] Other courts have reached the same conclusion for over a hundred years, in the context of both local telephone and local cable television franchises.[60] This case

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[54] *Compensation*, Black's Law Dictionary (9th ed. 2009).

[55] *Just Compensation*, Black's Law Dictionary (9th ed. 2009) (emphasis added); *Adequate Compensation*, Black's Law Dictionary (9th ed. 2009).

[56] *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984).

[57] *Id.* at 31 & n.15.

[58] *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

[59] *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997).

[60] *E.g., City of St. Louis v. W. Union Tel. Co.,* 148 U.S. 92, 98 (1893) (franchise fee is rent for use of local rights-of-way); *City of Plano v. Pub. Utils. Comm'n*, 953 S.W.2d 416, 420 (Tex. App. 1997) (gross receipts-based franchise fee is rent for use of local rights-of-way); *City of Albuquerque v. N.M. Pub. Serv. Comm'n*, 854 P.2d 348, 360 (N.M. 1993) (same); *City of Montrose v. Pub. Utils. Comm'n of Colo.*, 629 P.2d 619, 624 (Colo. 1981), *related proceeding,* 732 P.2d 1181 (Colo. 1987) (same); *City of Richmond v. Chesapeake & Potomac Tel. Co. of Va.,* 140 S.E.2d 683, 687 (Va. 1965) (same); *Pac. Tel. & Tel. Co. v. City of L.A.*, 282 P.2d 36, 43 (Cal. 1955) (same); *Telesat*

law was, of course, the backdrop against which Congress enacted Section 253(c): municipalities have been entitled to rent in the form of franchise fees from private business, such as telecommunications providers, that place permanent, extensive facilities in the ROW.

And Section 253(c)'s legislative history confirms that conclusion: Congress intended Section 253(c) to preserve the historical practice of rent-based ROW fees. Debate on the Barton-Stupak amendment in the House of Representatives is the only place in the legislative history of Section 253 where the meaning of ROW compensation was discussed.[61] The debate began with Representative Barton, one of the amendment's sponsors, who made clear that one of the primary purposes of the amendment was to prevent the federal government from telling local governments how to set compensation levels for local ROW:

> [The Barton-Stupak amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, *but also to set the compensation level for the use of that right-of-way* . . . . The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. *The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way*.[62]

Representative Fields then rose in opposition to the amendment, complaining that it would allow municipalities to impose on telecommunications providers what he felt were excessive ROW fees in the range of "up to 11 percent."[63] The amendment's other sponsor, Rep. Stupak, defending rent-based fees, stated:

Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); *Grp. W Cable, Inc. v. City of Santa Cruz,* 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), *rehearing denied,* 679 F. Supp. 977, 979 (1988) (same); *Erie Telecomms., Inc. v. City of Erie,* 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds,* 853 F.2d 1084 (3d Cir. 1988) (same).

[61] *See N.J. Payphone Ass'n v. Town of West New York*, 299 F.3d 235, 246-47 n.7 (3d Cir. 2002) (relying on the Barton-Stupak floor debate to interpret Section 253(c)); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002)(relying on Barton-Stupak amendment's elimination of "parity" provision to construe Section 253(c)).

[62] 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton) (emphasis added).

[63] *Id.* at H8461 (remarks of Rep. Fields).

> Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it . . . . This is a local control amendment, supported by mayors, State legislatures, counties, Governors. [64]

Finally, and perhaps most revealingly, Representative Bliley spoke in opposition to the amendment, making clear that neither the amendment, nor even the "parity language" that it replaced, was intended to preempt rent-based fees:

> I commend the gentleman from Texas [Mr. Barton], I commend the gentleman from Michigan [Mr. Stupak], who worked tirelessly to try to negotiate an agreement.
>
> The cities came back and said 10 percent gross receipts tax. Finally they made a big concession, 8 percent gross receipts tax. What we say is charge what you will, but do not discriminate. If you charge the cable company 8 percent, charge the phone company 8 percent, but do not discriminate. That is what they do here, and that is wrong. [65]

Two conclusions are apparent. *First*, both proponents *and* opponents of the Barton-Stupak amendment agreed that the amendment permitted rent-based ROW fees and eliminated federal second-guessing of the reasonableness of locally-set fees. *Second*, the House did not share Representative Field's distaste for rent-based fees; after hearing his concerns, the House overwhelmingly adopted the Barton-Stupak amendment by a 338 to 86 vote.[66]

Thus, construing Section 253's "fair and reasonable compensation" provision as not encompassing rent-based fees would improperly subvert the Congressional intent that is evident in both Section 253(c)'s plain language and its legislative history.

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[64] *Id.* (remarks of Rep. Stupak).

[65] *Id*. (remarks of Rep. Bliley).

[66] *Id.* at H8477 (recorded vote).

2. The Positions Urged by Mobilitie are Inconsistent with Reasonable Business Practices.

The Mobilitie Petition takes positions inconsistent with reasonable business practices and expectations. We feel confident, for example, that wireless providers' rates, as well as Mobilitie's charges to its customers, are not limited to an amount only sufficient to "recoup" their incremental costs. Mobilitie does not explain why taxpayers should be shortchanged in compensation for their property for the benefit of industry's private shareholders. Mobilitie's argument that compensation should be limited to an amount that allows the locality to "recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way"[67] also would turn every Section 253(c) dispute into a ratemaking proceeding. And its logic would also mean that almost all "compensation" for use of property or for goods or services today—including the wireless industry's own rates—is excessive and therefore not "fair and reasonable."

More generally, Mobilitie confuses application fees (almost always cost-recovery based) with ROW fees, as well as with light pole attachment fees. Application fees are generally set to recover the cost of reviewing an application. ROW fees, on the other hand, are rental charges for use of the ROW. And light pole attachment fees are also rent for attaching to a light pole. ROW fees and light pole attachment fees are separate rent charges for separate uses of different kinds of property; even in states where ROW or franchise fees are limited by statute, light pole attachment fees are not.

Mobilitie's suggestion that a fee is impermissibly discriminatory if it is not as low as the lowest rate charged to any competitor in the locality is divorced from reality.[68] Franchise and other ROW agreements are entered into at different times and under different circumstances. It

[67] Mobilitie Petition at 7.

[68] *Id.* at 7, 31-34.

is unreasonable to expect that the rent for use of municipal ROW or light poles should never change but should instead be locked into a rate charged 5, 10, or 100 years ago. This is certainly not how property is priced in the private sector, and Mobilitie offers no reasoned explanation as to why state and local governments, and their taxpayers, should perpetually be locked into below-market rates set long ago, just so that private profit-making users of public property can pay less.

Moreover, if, as Mobilitie urges, a ROW fee were to be truly cost-based, it would not meet Mobilitie's own proposed "non-discrimination" standard. A truly cost-based ROW fee would have to vary over time, by provider, and by location, as the scope and nature of ROW use, and the costs incurred, would be different in each case, and also would certainly vary over time.

Mobilitie's request that ROW compensation be "publicly disclosed by such government"[69] is already satisfied by state open records laws and local practices. The Commission should decline to take action on Mobilitie's request to impose additional, specific requirements beyond what state open records laws already require.[70] Section 253(c) should not, and cannot, be used as the basis to require local governments to spend additional taxpayer funds to package information already publicly available via state open records laws in whatever format Mobilitie happens to prefer.

3. The Commission May Not, Consistent with the Fifth Amendment, Compel Access to Local Right-of-Way or Other Municipal Property.

Compelling state and local governments to grant wireless providers access to municipal property—such as the ROW, light and utility poles, or water towers—would be a taking of

[69] 47 U.S.C. § 253(c).

[70] Mobilitie Petition at 34-35.

property within the meaning of the Fifth Amendment.[71] Such a taking would require, at minimum, just compensation in order to survive a facial challenge under the Fifth Amendment.[72] As discussed above, "just compensation" is fair market value.[73] The Commission therefore may not restrict fees local governments may charge for use of the ROW under Section 253(c) to anything less than fair market value.

4. The Tenth Amendment Prohibits the Commission from Commandeering State and Local Property for a Federal Purpose.

The Supreme Court has made clear that the Tenth Amendment and the principles of federalism it embodies prohibit the federal government from commandeering state or local government resources to accomplish federal goals.[74] The same principle bars the federal government from commandeering state and local ROW and other municipal property in pursuit of any Commission regulatory program to promote small cell/DAS deployment.

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[71] *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999).

[72] *See Gulf Power Co.*, 187 F.3d at 1331 ("a reasonable, certain, and adequate provision for obtaining compensation [must] exist at the time of the taking" (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985))).

[73] *Just Compensation*, Black's Law Dictionary (9th ed. 2009).

[74] *See Printz v. U.S.*, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."). *See also New York v. United States*, 505 U.S. 144, 156-57 (1992).

III. CONCLUSION

The Commission should deny the Mobilitie Petition and refrain from any further action in this docket.

Respectfully submitted,

/s/ *Tillman L. Lay*

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March 8, 2017

EXHIBIT 1

San Antonio Riverwalk. The elevator in the background is the location of a small cell tower, approved through the City's review process.

St. Paul Square. A commercial historic district.

River Walk Museum Reach.

Mission Concepcion.

EXHIBIT 2

View of Eugene and the view shed protection of the vistas of Spencer Butte.

EXHIBIT 3

Adam Grzybicki
President, OR/AK
External Affairs

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December 20, 2012

City of Eugene
Planning and Development Department
Sarah Medary, Executive Director AIC
99 W 10th Ave.
Eugene, OR 97401

VIA EMAIL AND FIRST CLASS MAIL

RE: AT&T Broadband Data Network Launch (4G LTE)

Dear Sarah:

On November 16, 2012, AT&T launched a major upgrade to its wireless network, known as 4G Long Term Evolution ("LTE"), in the City of Eugene. We wanted to take a moment to thank you – the City's leadership, professional and administrative staff – for your important contribution towards a successful launch.

Over the past year, AT&T has worked closely with the Planning and Development Department to obtain permits and approvals to upgrade all of its cell sites spread throughout the City. This was quite an effort – the volume and complexity of the permitting program could not have been accomplished without the efforts of your staff, particularly Katharine Kappa, Charlotte Curtis, Gabe Flock, Mike McKerrow, and each member of the review team.

AT&T's investment in the 4G LTE network will provide substantial economic benefits to the City for years to come. Millions of dollars have been invested throughout the region in permitting fees, staff, design, construction and equipment, directly benefitting the City's economy. AT&T's 4G LTE network provides data speeds to customers up to ten times faster than 3G, allowing the city to be more competitive across the nation and the world.

Again, we appreciate your efforts and support. Please extend our thanks and congratulations to your entire staff.

Sincerely yours,

Adam Grzybicki
President, Oregon
External Affairs

cc: Hon. Kitty Piercy, Mayor
Jon Ruiz, City Manager
Mike Sullivan, Community Development Manager

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling	)	WT Docket No. 16-421

REPLY COMMENTS OF THE CITIES OF SAN ANTONIO, TEXAS; EUGENE, OREGON; BOWIE, MARYLAND; HUNTSVILLE, ALABAMA; AND KNOXVILLE, TENNESSEE

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April 7, 2017

Table of Contents

The Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee (collectively, "Cities"), hereby reply to the opening comments filed in response to the *Public Notice* in the above-captioned proceeding[1] and the Petition for Declaratory Ruling of Mobilitie, LLC ("Mobilitie").[2]

The Cities strongly endorse and support the opening comments of other local government interests in this proceeding. We reply to the other opening comments as follows.

I. INTRODUCTION AND SUMMARY

A significant majority of the opening comments filed in this proceeding opposed any further federal intrusion into or preemption of state or local right-of-way ("ROW") or land use laws. The exception, of course, was industry commenters. What is evident from those comments is the primary motivation behind many, if not most, industry requests for FCC action: to persuade the Commission to confer on wireless and neutral host small cell providers a federal entitlement to install their private facilities on state and local government property at below-market rates, on an expedited basis, and subject only to FCC-permitted conditions. But the Communications Act does not, and legally cannot, confer on industry the entitlement it seeks.

Industry seeks to justify its request based largely on the anonymous and unverified allegations made against unnamed state and local governments. Although industry commenters claim they do not name individual local governments out of supposed concern about generating ill will,[3] anonymously attacking a party behind its back is a remarkably deceitful way to avoid

[1] FCC, Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies (Dec. 22, 2016) ("*Public Notice*").

[2] *In re Promoting Broadband for All Ams. By Prohibiting Excessive Charges for Access to Pub. Rights of Way*, Petition for Declaratory Ruling (Nov. 15, 2016) ("Mobilitie Petition").

[3] *See, e.g.*, Comments of CTIA at 39, WT Docket No. 16-421 (Mar. 8, 2017) ("CTIA Comments"); Comments of AT&T at 7 n.19, WT Docket No. 16-421 (Mar. 8, 2017) ("AT&T Comments").

generating ill will. It is more plausibly a way to evade factual rebuttal from the local governments that industry criticizes.

What industry seeks is preemptive federal access to state and local ROW that belong to neither industry nor the federal government. Having previously complained about preferences for siting on municipal property,[4] industry now demands preferential access to ROW and municipal poles to take advantage of what it hopes will be, by Commission decree, cheap rates and favorable terms.[5] The City of Coral Gables submitted an account of its dealings with Mobilitie confirming industry's motivation:

> One proposed location was for an attachment to an existing light pole, but others were for new towers ranging in height from approximate[ly] 26 feet, several at approximately 40-45 feet, three at slightly over 70 feet and one at 120 feet, to be located in commercial and residential areas of the City in the rights of way, often adjacent to single family homes and in areas where there were no above-ground utilities. The proposed 120' pole was to be located adjacent to single family residential homes and a small park. When asked why Mobilitie did not seek to locate its facilities on existing towers and buildings, which seemed possible for some locations, or to site facilities on private property in a manner that would be less impactful, ***Mobilitie responded that it did not want to pay rent.*** It did not [identify] a technical reason why it could not locate its facilities on existing structures or private property.[6]

Industry also asks the FCC to supplant local ROW authority with industry's self-interested judgment about what are reasonable ROW practices. Sprint, for instance, argues that

[4] The Commission previously declined to find such municipal property preferences *per se* unreasonably discriminatory or otherwise unlawful under Section 332(c)(7). *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Report and Order ¶ 278, 29 FCC Rcd. 12865 (Oct. 21, 2014) ("*Spectrum Act Order*"), *amended In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Erratum, 30 FCC Rcd. 31 (Jan. 5, 2015).

[5] *E.g.*, Comments of T-Mobile USA, Inc. at 29-30, WT Docket No. 16-421 (Mar. 8, 2017) ("T-Mobile Comments").

[6] Comments of the Florida Coalition of Local Governments at 22, WT Docket No. 16-421 (Mar. 8, 2017) (emphasis added).

carriers will only put facilities where they are needed, so the Commission should not allow local governments to effectively second guess carriers' decisions.[7]

But wireless providers' self-interest is no substitute for state and local government police power in adequately protecting public safety and preserving public property. The record makes plain that state and local government commenters support deployment of wireless infrastructure,[8] but not at the expense of public safety, or their taxpayers' subsidization of industry's private, profit-making use of public property. The Commission has previously recognized the need to preserve an incentive for wireless providers "to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable,"[9] and industry comments here reinforce this need.

In these reply comments, the Cities focus on the following points raised in the opening comments in this proceeding:

- The Commission should give no weight to industry allegations about local government actions or practices where the locality is not identified and therefore cannot defend itself;

[7] Comments of Sprint Corp. at 22-23, WT Docket No. 16-421 (Mar. 8, 2017) ("Sprint Comments").

[8] *See, e.g.*, Comments of the City of San Antonio et al., WT Docket No. 16-421 (Mar. 8, 2017) ("Cities Comments"); Comments of the Virginia Joint Commenters at 6-9, WT Docket No. 16-421 (Mar. 8, 2017) (discussing evolving legislation to streamline and expedite application process); City of Rochester Comments at 2, WT Docket No. 16-421 (Mar. 8, 2017) (discussing collaborations with wireless infrastructure applicants); Comments of Smart Communities Siting Coalition at 35-36, WT Docket No. 16-421 (Mar. 8, 2017) (discussing amount of successful small cell deployment) ("Smart Communities Comments").

[9] *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance ("Shot Clock Proceeding")*, WT Docket No. 08-165, Declaratory Ruling ¶ 38, 24 FCC Rcd. 13994 (Nov. 18, 2009) ("*Shot Clock Order*").

- The record makes clear that industry's own actions and inactions sometimes frustrate expeditious wireless infrastructure deployment;
- Additional nationwide, one-size-fits-all definitions will hinder, not promote, deployment;
- The Commission should not, and legally cannot, adopt a "deemed granted" remedy for Section 332(c)(7);
- The Commission should not shorten the Section 332(c)(7) shot clocks;
- There is no need for the Commission to address moratoria further;
- The Commission should not attempt to assert control over access to state and local government property;
- No action on fees is needed;
- No clarification of "prohibit or have the effect of prohibiting" is needed; and
- Local governments must retain the ability to enforce zoning and other generally applicable codes on Section 6409(a) eligible facilities requests.

The Cities also note that opening comments from industry raise several issues outside the scope of the *Public Notice* and the Mobilitie Petition, and those issues should not be further entertained in this proceeding.

II. REPLY COMMENTS

A. As a Matter of Fundamental Fairness, the Commission Should Not Rely on Industry Allegations About Local Government Actions, Inactions, or Practices Where the Locality is Not Identified by Name.

For the most part, industry commenters seek to justify their requests for Commission action on tales of alleged conflict with and delay by local governments. But few of these accounts provide the name of either the applicant[10] or the local government accused.[11] Most instead refer to an unnamed "municipality" or "locality" in a given state or, sometimes, just a region of the country. This practice deprives these local governments of notice of the allegations against them and an opportunity to respond. And without hearing the other side of the story, the Commission is left with self-serving, unverifiable, and therefore unreliable, assertions.

Although industry claims the reason for not naming names is to avoid localities' "ill will," another obvious benefit to leaving the locality unnamed is to allow the industry member to play fast and loose with the facts without being called on it because the unnamed local government has no opportunity for rebuttal. It would therefore be improper for the Commission to take action based on these anonymous, unverifiable allegations.

The Commission has emphasized the importance of providing accused local governments with the opportunity for rebuttal. Note 1 to Section 1.1206(a) of the Commission's rules provides:

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[10] *See* Comments of the Wireless Infrastructure Ass'n, WT Docket No. 16-421 (Mar. 8, 2017) (discussing experiences of WIA members without identifying the particular applicant) ("WIA Comments").

[11] *See, e.g.*, Comments of Verizon at Appendix A, WT Docket No. 16-421 (Mar. 8, 2017) (identifying localities by general geographic region only) ("Verizon Comments"); AT&T Comments; Comments of Crown Castle International Corp., WT Docket No. 16-421 (Mar. 8, 2017) (one of the few to name many of the governments they discuss) ("Crown Castle Comments"); CTIA Comments; Comments of Mobilitie, LLC, WT Docket No. 16-421 (Mar. 8, 2017) ("Mobilitie Comments"); WIA Comments; Comments of ExteNet Systems, Inc. at 12-17, WT Docket No. 16-421 (Mar. 8, 2017) ("ExteNet Comments").

> In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.[12]

The Mobilitie Petition is rife with references to the actions of unnamed "communities," "localities," and "cities," each of which Mobilitie accuses of charging excessive or discriminatory fees.[13] And Mobilitie claims that all of "[t]he charges described above clearly violate Congress' directive [in Section 253(c)] because [according to Mobilitie] they are not tied in any way to actual costs of issuing permits and managing rights of way."[14] In other words, the Mobilitie Petition alleges that each of the fees and charges allegedly imposed by each of the local governments it refuses to name violates Section 253. If the Commission were to rule as Mobilitie requests and find those fees and charges inconsistent with Section 253, then it would be preempting those fees and charges. The Mobilitie Petition therefore is a "petition[ ] for declaratory ruling that seek[s] Commission preemption of state or local regulatory authority" within the meaning of Section 1.1206(a), Note 1. Yet Mobilitie has not identified, much less served, the unnamed local governments it accuses. Note 1 therefore requires that the Mobilitie

[12] 47 C.F.R. § 1.1206(a) note 1 to para. (a).

[13] Mobilitie Petition at 4, 14-19.

[14] *Id.* at 20.

Petition "be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules."[15]

Moreover, in the 2009 *Shot Clock Order*, the Commission explicitly "agree[d] that an opportunity for rebuttal is an important element of process," and preserved an opportunity for rebuttal "by establishing presumptively reasonable timeframes that will allow the reasonableness of any particular failure to act to be litigated."[16] Consistent with this principle of fairness and process, the Commission should not rely in this proceeding on nameless accusations as a justification to further preempt local government authority. Relying on these unsubstantiated allegations would not constitute reasoned decisionmaking, nor would it result in sound public policy.[17]

B. The Record Reveals That Wireless Applicants Are Themselves the Cause of Delay in Wireless Infrastructure Deployment.

Although industry commenters assert that delays in wireless facilities deployment are the result of obstruction by local governments, the record suggests otherwise: in many cases, delays result from wireless applicants' actions that make it more difficult for governments to process their applications. Applications are sometimes incomplete; they misrepresent the size and structure of the proposed facilities, or fail to take into account local circumstances, such as undergrounding districts, viewsheds, surrounding structures, or historic areas. Application processing delays resulting from these types of defects would not be alleviated by imposing further FCC regulation on state and local government application processes. Rather,

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[15] 47 C.F.R. § 1.1206(a) note 1 to para. (a). But even if the Mobilitie Petition and industry commenters' allegations about unnamed localities were found not to fall within the literal words of Note 1, there can be no question that they violate the rule's purpose and spirit. The Commission should not tolerate such evasions of its rules, much less reward or encourage them by relying on industry's one-sided, anonymous attacks on unnamed municipalities.

[16] *Shot Clock Order*, ¶ 34 n.111.

[17] *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 431-32 (3d Cir. 2004).

encouraging cooperation between industry and local governments has proven more effective in promoting small cell deployment.

The record reveals that Mobilitie and other industry actors often fail to make a reasonable effort to comply with local siting processes, filing incomplete applications, and failing to respond to requests to supply the missing information. For example, Montgomery County, Maryland, explains in its comments that in July and September 2016, Mobilitie filed over 100 incomplete applications, and never responded to the County's written requests for the missing information. Only after ten months of back-and-forth did the County finally receive its first complete application.[18] Montgomery County's experience is hardly unique. The City of Richmond, California, reported receiving a batch of thirty-one incomplete permit applications from ExteNet.[19] The Virginia Department of Transportation ("VDOT or Virginia DOT") commented that out of 500 applications for proposed small cell locations it had received from Mobilitie, 450 were incomplete.[20] The record is replete with further examples of this behavior.[21] As the Wireless Communications Initiative notes, "[t]he wireless industry has hurt itself in some cases by rushing projects forward with poor consideration for aesthetics and community impact."[22]

[18] Supplemental Comments of Montgomery County, Maryland at 20, WT Docket No. 16-421 (Mar. 8, 2017).

[19] Joint Comments of the League of Arizona Cities et al. at 18-19, WT Docket No. 16-421 (Mar. 8, 2017) ("Local Governments Comments").

[20] *See* Comments of the Virginia Department of Transportation at 7 ("To date, Mobilitie has notified VDOT of the proposed locations of 500 small cell facilities. With respect to approximately 450 of those locations, Mobilitie has provided only the latitude and longitude of the proposed site.") ("VDOT Comments").

[21] *See, e.g.*, Local Governments Comments at 17-18; Florida Coalition Comments at 17-18, 28; Comments of Cary, North Carolina at 6, WT Docket No. 16-421 (Mar. 8, 2017) ("Town of Cary Comments") (describing Mobilitie's applications for installation of 120-foot towers in the right-of-way as "confusing and ambiguous, as it was not clear exactly what type of facility was proposed"); Comments on Behalf of the Following Cities in Washington State: Bellevue et al. at 3, WT Docket No. 16-421 (Mar. 8, 2017) ("All of the applications submitted by Mobilitie were, and remain, incomplete") ("Washington State Cities Comments").

[22] Comments of the Wireless Communications Initiative at 7, WT Docket No. 16-421 (Mar. 7, 2017).

Also widely reported by local government commenters are siting applications that misrepresent the size and structure of the proposed facilities, as well as those that ignore unique local aesthetic and historic considerations.[23] Particularly disruptive are applicants that erroneously claim exemptions from local permitting procedures, local regulations, and state environmental compliance laws.[24] The Local Governments, for example, reported in their comments that Mobilitie, Crown Castle, ExteNet, and Verizon Wireless all misrepresented their status as either telephone corporations or competitive local exchange carriers.[25] Applicants' lack of transparency and accuracy in their small cell siting applications delays local governments' ability to process applications efficiently, and requires more back-and-forth with applicants to clarify the deficient portions of the application. And vigilance on the part of local governments has often proven necessary, as some municipal commenters report that industry actors have modified existing wireless facilities, and even constructed entirely new facilities, in public ROW without notice to, much less approval by, the local government.[26]

State and local government comments also demonstrate successful collaboration with the telecommunications industry to expedite the application process. These collaborative strategies are widely varied and often geared toward the needs of the particular community. For example,

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[23] *See, e.g.*, Local Governments Comments at 15 ("In La Crosse, Wisconsin, Mobilitie's representatives presented information about Mobilitie's facilities that falsely represented their physical size and scale."); Board of County Road Commissioners of Oakland County, Michigan at 6, WT Docket No. 16-421 (Mar. 7, 2017) (explaining that Mobilitie sought to build 120 foot monopoles in rights of way that are "full of pedestrian and vehicle traffic, and . . . usually only 66 feet wide," raising unique safety concerns and requiring different permitting procedures from typical 40-foot installations) ("RCOC Comments"); Comments of the City of Jackson at 2, WT Docket No. 16-421 (Feb. 6, 2017) ("[t]he City has serious aesthetic and safety concerns" with the proposed towers) ("City of Jackson Comments").

[24] *See, e.g.*, Local Governments Comments at 10; Texas Municipal League Comments at 20, WT Docket No. 16-421 (Mar. 8, 2017) ("TML Comments"); RCOC Comments at 7; City of Jackson Comments at 2.

[25] Local Governments Comments at 13.

[26] *See, e.g.*, Local Governments Comments at 20-21; Comments of Cityscape Consultants, Inc. at 3, WT Docket No. 16-421 (Mar. 7, 2017) (explaining that in Denison, Texas, "Mobilitie constructed two towers in public rights of way without obtaining the proper permits from the City and by presenting ***their form*** which had a water department employee signature on it as authorization for construction of the facilities.") (emphasis in original).

the City of San Francisco amended its city code in 2011 to permit applicants to install wireless facilities in any zoning district, including residential and historic districts, and to make the application process faster.[27] And the City of Springfield, Oregon commented that after it updated and amended its city code, "no [wireless telecommunications system] facility applications for Discretionary Use or Site Plan Approval have been denied . . . ."[28]

Some localities also report building flexibility into the regulatory process in order to provide efficient siting decisions. Examples include providing government officials the discretion to waive some regulatory requirements, as well as exempting certain types of applications from review altogether.[29] Others report shaping their application processes with input from telecommunications companies. For instance, the Town of Cary, North Carolina, states that:

> During 2011, many workshops were held with Cary staff, representatives from wireless carriers, and citizens, to develop recommendations for amendments to the ordinance to help accommodate [stealth towers]. The Town is similarly willing to engage all interested parties in discussion regarding deployment of small cell and other new technologies.[30]

Similarly, comments on behalf of Washington State Cities describe an amicable relationship with the telecommunications industry: "We are not developing these ordinances, permitting processes, applications or model franchises in a vacuum, but rather in collaboration with

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[27] Comments of the City and County of San Francisco at 4, WT Docket No. 16-421 (Mar. 8, 2017) ("San Francisco Comments").

[28] Comments of Springfield, Oregon at 3, WT Docket No. 16-421 (Mar. 7, 2017).

[29] *See, e.g.*, Comments of the State of New Jersey Pinelands Commission at 4, WT Docket No. 16-421 (Mar. 8, 2017) (explaining that installations of local communications antenna on existing structures are exempt from review so long as they are consistent with a pre-existing communications plan); Comments of the Town of Hempstead, New York at 2, WT Docket No. 16-421 (Mar. 8, 2017) (encouraging pre-application site visits and conferences to identify potential problems with an application, as well as requirements that appear unnecessary and could be waived) ("Town of Hempstead Comments").

[30] Town of Cary Comments at 3.

telecommunications representatives and local utilities providing electricity, fiber and other infrastructure."[31] Some cities have also negotiated master license agreements delineating reasonable conditions for use of the local rights-of-way with Verizon, Mobilitie, Crown Castle, and Zayo.[32] The Smart Communities Siting Coalition reports that "[t]he process [of negotiating a master license agreement with the City of San Antonio] enabled Verizon to plan ahead, with predictability and stability, for its small cell deployment, while simultaneously enabling the City to protect key public interests (such as public safety), critical historic sites . . . and the vibrant tourism economy."[33]

Local governments' opening comments demonstrate that these collaborative strategies effectively decreased application processing time and increased the rate of small cell deployment.[34] The variety of collaborative solutions reported in the opening comments demonstrates not only that there is no need for any one-size-fits-all approach to be handed down by the Commission, but that such an approach would be counterproductive.

C. Comments Confirm the Difficulty of Defining Terms for Nationwide Application.

The *Public Notice* asked for comment about the possibility of setting a different shot clock for "batches" of small cell siting applications and what should qualify as a "batch."[35]

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[31] Washington State Cities Comments at 3.

[32] *See, e.g.*, TML Comments at 19; Comments of the Georgia Municipal Ass'n at 3-4, WT Docket No. 16-421 (Feb. 28, 2017). Some industry commenters discuss such master license agreements relatively favorably (*see, e.g.*, Verizon Comments at 7-8), while others claim that "local governments use these master agreements as a substitute for a comprehensive legal framework" (Comments of Nokia at 5, WT Docket No. 16-421 (Mar. 8, 2017) ("Nokia Comments")). This inconsistency highlights the fact that the only *consistent* industry position is that local governments are the problem and need to be preempted by the FCC.

[33] Report and Declaration of Andrew Afflerbach at 22-23, Exhibit 1 to Smart Communities Comments ("Ex. 1 to Smart Communities Comments").

[34] *See, e.g.*, Smart Communities Comments at 35-36; Town of Hempstead Comments at 2 (granting 500 wireless applications in the past 6 years, and denying none); Comments of the City of Austin at 7, WT Docket No. 16-421 (Mar. 8, 2017) (applications processed in one week or less).

[35] *Public Notice* at 11-12.

Industry comments, however, succeed only in confirming our point: There is no reasoned way to define "batches," much less set a single nationwide shot clock for them.[36]

Industry commenters cannot agree on a definition. Globalstar says that an application should have, at minimum, five small cell facility sites to be a "batch" and seeks a 120-day shot clock to process small cell collocation batches, and a 180-day clock for other batches of small cells.[37] Other industry commenters, however, do not think there should be a longer time period for processing batches.[38]

The term "batch" is even more problematic when applicants seek to place facilities on municipal street light and traffic signal poles. In those cases, the particular type of attachment and the location of the individual pole necessitates a case-by-case approach. Considerations relevant to an application are not only the attachment, but also the structure to which it is attached, which are likely to vary, often significantly, from structure to structure. That further complicates any attempt to define a "batch" of applications or apply a different rule to the processing of such a batch.

Similarly, although few industry commenters offered a definition of "small cell,"[39] there seems to be no uniform definition of what constitutes "small cell" facilities, nor any agreement on what the maximum permissible dimensions of such facilities should be. Despite this lack of agreement, industry commenters nonetheless seek widely varying shot clocks or other remedies for whatever can be deemed a "small cell" application. This, however, is another example of an

[36] Cities Comments at 17, 19-20.

[37] Comments of Globalstar, Inc. at 12, WT Docket No. 16-421 (Mar. 8, 2017) ("Globalstar Comments").

[38] *See, e.g.*, Sprint Comments at 44 (advocating for no batching requirement or any extended deadline when applications are submitted in batches); WIA Comments at 60 (no longer review time for batching).

[39] Eco-Site does attempt a definition. Comments of Eco-Site, Inc. at 2, WT Docket No. 16-421 (Mar. 8, 2017).

area where the impacts, rather than the technical classification, of proposed facilities are likely to be far more relevant to local review, counseling against the adoption of a one-size-fits-all definition.[40]

Ultimately, there are different practices across jurisdictions in how batched and small cell applications are handled most efficiently.[41] A one-size-fits-all approach would not be appropriate here, and would likely hinder progress, as it would force local jurisdictions to adopt a process wholly unrelated to unique local circumstances.

D. The Commission Should Not Adopt a Deemed Granted Remedy for Section 332(c)(7).

The Commission should not accept industry invitations to revisit its prior decisions that it has no authority to impose or require a deemed granted remedy in Section 332(c)(7) cases.[42] The Commission previously considered and rejected industry's arguments, and the factual circumstances—as well as the statutory language—have not changed in the intervening time. As a result, no different conclusion is warranted.[43]

Section 332(c)(7) provides the remedy for alleged violations of the statute:

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[40] *See* Smart Communities Comments at 10-11.

[41] *See, e.g.*, Cities Comments at 20.

[42] *See, e.g.*, AT&T Comments at 25; Comments of Competitive Carriers Ass'n at 13-14, WT Docket No. 16-421 (Mar. 8, 2017) ("CCA Comments").

[43] As in the proceeding that resulted in the *Shot Clock Order*, industry commenters here argue for a deemed granted remedy based on the Commission's earlier decision in *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (Mar. 5, 2007) ("*Video Franchising Order*"). *Compare* T-Mobile Comments at 27-28 (alleging that "the Commission has already adopted a 'deemed granted' remedy in a similar case") *with* CTIA, Petition for Declaratory Ruling at 27, *Shot Clock Proceeding,* WT Docket No. 08-165 (July 11, 2008) (arguing that "[a]s the Commission recognized in the [*Video Franchising Order*], such incentives are necessary to ensure that federal pro-deployment goals are met"). But the Commission's interpretation of Section 621(a) in the *Video Franchising Order* involved a very different statutory framework from that of Section 332(c)(7). Unlike Section 332(c)(7), Section 621(a) contains no language or legislative history giving courts exclusive jurisdiction over disputes arising under it.

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this sub-paragraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief. [44]

Except for RF-related disputes, adjudication in courts is the exclusive remedy for alleged Section 332(c)(7)(B) violations. Section 332(c)(7)(B)(v) provides for judicial review by a court of competent jurisdiction when the state or local government has failed to act within a reasonable period of time. The court, not the Commission, is tasked by statute both with making the ultimate determination as to whether the locality's decision was made within a reasonable period of time and with deciding what the appropriate remedy is if the locality failed to do so. And the court is to do so on a case-by-case basis. Courts undertaking review of failures to act within a reasonable time have, on occasion, issued injunctions requiring the locality to grant the application, but only *after* a comprehensive review of the facts specific to a case.[45] The Commission has already correctly determined that Congressional intent is clear that the "courts should have the responsibility to fashion appropriate case-specific remedies."[46]

Even if the FCC were inclined to reconsider its rationale in the *Shot Clock Order*, the Fifth Circuit's *Arlington* decision affirming the *Shot Clock Order* leaves the Commission with no room to reverse course and adopt a "deemed granted" remedy.[47] The Fifth Circuit noted that,

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[44] 47 U.S.C. § 332(c)(7)(B)(v).

[45] *Shot Clock Order*, ¶ 39 ("It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.").

[46] *Id. See also Spectrum Act Order*, ¶ 284 (again declining to adopt an additional remedy and noting Congressional focus on prompt judicial relief).

[47] *City of Arlington v. FCC*, 668 F.3d 229, 259 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

while a court considering a challenge to state or local government inaction under Section 332(c)(7)(B) will give deference to the FCC's "shot clock" presumption of what constitutes a reasonable period of time, the court in Section 332(c)(7)(B)(v) actions must also be allowed to consider any evidence speaking to the reasonableness of the state or local government's inaction.[48] In other words, the statute entitles the state or local government to the opportunity to rebut *in court* the *Shot Clock Order's* presumption of unreasonableness by providing reasons for the delay, such as extenuating circumstances, the applicant's failure to submit requested information, or the complexity of the particular application.[49] Thus, the *Shot Clock Order* presumption does not decide a case in a particular way, but rather determines which party in a Section 332(c)(7)(B)(v) court action bears the burden of producing evidence to challenge the presumption.[50] A Commission-imposed "deemed granted" remedy, in contrast, would impermissibly usurp the court's jurisdiction under Section 332(c)(7)(B)(v).[51]

E. The Record Reveals No Reasoned Basis for Shortening the Shot Clocks.

Several industry commenters ask the Commission to shorten the existing shot clocks.[52] The Commission should reject the request. Industry commenters have not shown that the existing shot clocks are too long, or that shortening them would lead to faster deployment (as opposed to more court litigation triggered by a shorter shot clock's more rapid expiration in a particular case). Moreover, the same need to accommodate a variety of local fact situations that existed when the Commission adopted the current shot clocks still exists today.

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[48] *Id.*

[49] *Id.* at 259-60.

[50] *Id.* at 256.

[51] *Id.* at 260.

[52] *See, e.g.*, CCA Comments at 11-13; CTIA Comments at 36-38 (asking for 60 days for collocations, 90 days for other applications); Comments of Mobile Future at 4-6, WT Docket No. 16-421 (Mar. 8, 2017) ("Mobile Future Comments"); T-Mobile Comments at 23 (asking for 60/90).

The presumptively reasonable time frame established by the current shot clocks must be flexible because of their general applicability. As the FCC previously stated, "Although . . . the reviewing court will have the opportunity to consider such unique circumstances in individual cases, it is important for purposes of certainty and orderly processing that the timeframes for determining when suit may be brought in fact accommodate reasonable processes in most instances."[53]

Verizon states that "[a]t the time of adoption, the Section 332(c)(7) shot clock for placements and modifications on existing structures did not specifically contemplate small cells."[54] Verizon then asserts that a shorter shot clock is warranted for small cells and would be consistent with the Section 6409(a) shot clock. Yet Verizon ignores that the Commission ruled that the existing shot clocks apply to small cells in its rulemaking implementing Section 6409(a).[55] There, the Commission "clarif[ied] that to the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to applications related to other personal wireless service facilities."[56]

Moreover, the label "small" in the phrase, "small cell," does not mean that the facilities are physically small, nor does it follow that the state or local processes required to review small cell applications will necessarily be shorter than for so-called "macro" facilities. Rather, these

[53] *Shot Clock Order*, ¶ 44.

[54] Verizon Comments at 26.

[55] *See Spectrum Act Order*, ¶¶ 268-272.

[56] *Id.* ¶ 270.

facilities are "designed to serve a smaller area than traditional 'macrocells.'"[57] The record makes plain that many "small cell" facilities are not "small" at all, especially where they are proposed to be placed in the confined space of the ROW.[58] In reality, "[s]mall cell technologies vary in size and profile, depending on the functionality they are designed to provide."[59] Verizon and other industry commenters urging shorter shot clocks are simply wrong in suggesting otherwise.

F. "Existing Base Station" in Section 6409(a) Does Not Include Structures Not Supporting Any Wireless Facilities at the Time of the Application.

Industry commenters ask the Commission to find that a support structure need not actually have any wireless services facilities attached in order to be considered "an existing wireless tower or base station" under Section 6409(a).[60] As an initial matter, this issue is outside the scope of the *Public Notice*. It raises significant concerns for many state and local governments, and any changes to the Commission's interpretation of "existing" in this context should not be considered without a full opportunity for notice and comment rulemaking. Should the Commission nevertheless decide to entertain this issue in this proceeding, however, the Cities urge the Commission to find that such an interpretation would be contrary to the plain meaning and the intent of the statute.

In the *Spectrum Act Order*, the Commission defined "existing . . . base station" as a structure that "*at the time of the application*, supports or houses an antenna, transceiver, or other

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[57] Ex. 1 to Smart Communities Comments at 2. *See also* Smart Communities Comments at 12-13 ("The term 'small cell' is typically used to describe an installation that serves a small area—not to distinguish between facilities that are 'small v. those that are large.'").

[58] *See* Smart Communities Comments at 12-13; NATOA Comments at 11-12. *See also* San Francisco Comments at 27 (even where facilities are physically small, they can still have "a substantial impact in a dense, urban setting").

[59] Ex. 1 to Smart Communities Comments at 2; *id.* at 3-6 (photographs of "small cell" installations showing variety in size).

[60] *See, e.g.*, Crown Castle Comments at 38; Verizon Comments at 27-30; Crown Castle Comments at 38-39.

associated equipment that constitutes part of a 'base station.'"[61] The notion that any existing building, pole or other structure with no wireless facilities at all could be considered an "existing base station" within the meaning of Section 6409(a) flies in the face of the statute's plain language, as well as its purpose. Section 6409(a) rests on the premise that modifications or changes to existing wireless facilities that do not involve a substantial change in size should be subject to more streamlined review. But that premise evaporates if every single existing structure in a locality that has no wireless facilities on it is treated as an "existing base station." Industry's warped reading of the statute would force localities to substantially revise and enlarge the scope of their land use and building code reviews of all new structures generally, because localities would now have to review not only the structure as proposed, but also the structure as a future potential "existing base station" susceptible to the modifications permitted by Section 6409(a) without further full review. This would, in effect, subvert local processes that function independently of, and for purposes wholly unrelated to, the siting of wireless facilities. Section 6409(a) cannot be stretched that far.

To be sure, the Cities are aware of the August 2016 change to the National Programmatic Agreement's definition of "[c]ollocation" as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, *whether or not there is an existing antenna on the structure*."[62] But the emphasized language was added in August 2016, long after the Commission's *Spectrum Act Order*. This language was *not* in the 2009 Collocation Agreement, which the FCC had pointed to in the *Shot Clock Order* and *Spectrum Act Order*, and thus the

[61] *Spectrum Act Order*, ¶ 168 (emphasis added).

[62] 47 C.F.R. pt. 1, app. B (emphasis added).

language added in 2016 cannot now be grafted onto the 2009 *Shot Clock Order* or the 2015 *Spectrum Act Order*. Further, in making that 2016 change to the Collocation Agreement, the FCC clarified in its notice of these amendments that the agreement only applies to its National Historic Preservation Act Section 106 review process.[63] This amendment to the National Programmatic Agreement therefore does not support expanding the term, "existing base station," as industry commenters suggest.

Further, in the appeal of the *Spectrum Act Order*, the FCC defended its definition of "base station" against a challenge that it was overly broad—essentially swallowing the definition of "tower"—by conceding that while "tower" includes structures not currently supporting wireless facilities, the term "base station" does not.[64] The Fourth Circuit, in upholding the FCC's definition, specifically relied on the Commission's argument that "a 'base station' includes a structure that is not a wireless tower only where it already supports or houses such equipment."[65] The Commission cannot, consistent with *Montgomery County*, now interpret "base station" to include structures without any wireless facilities.

G. No Additional Remedy is Needed to Address Moratoria.

Industry commenters point to moratoria as obstacles to deployment of small cell facilities[66] and seek "clarification" that moratoria violate Section 253(a).[67] But they acknowledge that the Commission already has stated clearly that moratoria do not toll Section

[63] *In re WTB Seeks Comment On Revising the Historic Preservation Review Process for Small Facility Deployments*, WT Docket No. 15-180, Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 31 FCC Rcd. 8824 (Aug. 8, 2016).

[64] *Montgomery County v. FCC*, 811 F.3d 121, 132-33 (4th Cir. 2015).

[65] *Id.* at 133.

[66] AT&T Comments at 7; CCA Comments at 31-34; CTIA Comments at 12.

[67] AT&T Comments at 10; CTIA Comments at 25-26; Mobilitie Comments at 10-12.

332(c)(7) timeframes,[68] and they also overlook that due to Section 332(c)(7)(A), Section 253(a) does not even apply to local decisions about the siting of small cell facilities.

As we and others have already pointed out, Section 332(c)(7)(A)'s "nothing in this Act" language means that Section 253(a) does not apply to—or even so much as "affect"—local decisions regarding the placement of wireless facilities, including small cell facilities.[69] Section 332(c)(7)(A), by its terms, bars application of Section 253 to local authority over wireless siting.

Moreover, industry's misguided effort to apply Section 253(a) to wireless siting ignores that the Commission has already dealt with moratoria under Section 332(c)(7)(B). In the *Spectrum Act Order*, the Commission "clarif[ied] that the shot clock runs regardless of any moratorium."[70] The Commission went on to state:

> We are confident that industry and local governments can work together to resolve applications that may require more staff resources due to complexity, pending changes to the relevant siting regulations, or other special circumstances. Moreover, in those instances in which a moratorium may reasonably prevent a State or municipality from processing an application within the applicable timeframe, the State or municipality will, if the applicant seeks review, have an opportunity to justify the delay in court.[71]

As with other issues arising under Section 332(c)(7), the Commission found that courts were "well situated" to resolve disputes in this area.[72]

Yet industry commenters protest the adequacy of a court remedy, arguing that the remedy provided by statute is insufficient to prevent delays.[73] It is unclear why, particularly in the case

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[68] AT&T Comments at 7; CCA Comments at 31.

[69] *See, e.g.*, Cities Comments at 10-14; Smart Communities Comments at 51-55.

[70] *Spectrum Act Order*, ¶ 265.

[71] *Id.* ¶ 266.

[72] *Id.* ¶ 267.

[73] CCA Comments at 31.

of a moratorium, the expedited case-by-case court remedy provided by Section 332(c)(7)(B)(v), coupled with the FCC's presumptive shot clocks, would be insufficient. But even if it were, the court remedy is what Congress gave; if industry wants more, it must go to Congress. An unelected Commission cannot give industry what Congress declined to give it.

H. The Proprietary Nature of the ROW is a Matter of State Law that the Commission Cannot Preempt or Change.

Industry commenters ask the Commission to clarify the application of the Commission's shot clocks to municipal property, including ROW and poles.[74] What industry commenters seek, in essence, is to have an unelected federal agency construe a statute to give private for-profit companies a federal right to install their facilities on state and local property. But neither Section 253 nor Section 332(c)(7) can be stretched to authorize such a federal taking of state and local government property. Congress would need to clearly provide for a taking, and even with just compensation,[75] there would still remain the question whether the Constitution would permit Congress to commandeer state and local property for a federal purpose.[76] Thus, the Commission cannot grant the relief industry seeks.

T-Mobile nevertheless argues that access to the ROW and municipal poles is "fundamentally different" from access to a municipal building or park because poles and the ROW are "public property *intended to serve as the locations for public services.*"[77] This oversimplification fails to grasp that it is state and local law, not federal law or the FCC, which decides what permissible "public services" are entitled to special access to state or local ROW. For example, under many state and local laws, the ROW's primary public purpose is vehicular

[74] *See* CTIA Comments at 19, 43; Mobilitie at 21; T-Mobile Comments at 30; CCA Comments at 28.

[75] *See* Cities Comments at 27-28.

[76] *See id.* at 28.

[77] T-Mobile Comments at 30.

and pedestrian transportation, *not* utility services, much less non-utility services provided by non-utility entities.[78] Similarly, street light and traffic signal poles are primarily for municipal public safety functions, not to enhance the sales of private commercial services. It is the responsibility of the state or local government, not a wireless applicant or the Commission, to determine how best to use state or local public ROW or other public property to serve the public good.[79]

The relevant inquiry to determine whether a state or local government's interest in the ROW is proprietary is whether the government is acting as a landlord or as a regulator.[80] But that is a matter of state law, and the answer varies not only by state, but from ROW to ROW within a state. "Since rights-of-way definitions, access restrictions, and safety considerations differ between the states, the rights granted to states to allow and regulate utilities or any other non-highway use of rights-of-way must not be infringed."[81] The Commission lacks the constitutional and statutory authority to rewrite the laws of the fifty states relating to ROW ownership and access to make them uniform.[82]

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[78] *See, e.g.*, Comments of Maine Department of Transportation at 1, WT Docket No. 16-421 (Mar. 8, 2017) ("the Maine Law Court has made it clear that transportation uses are paramount on the State's highways and bridges").

[79] *See* TML Comments at 7 (Texas municipalities "hold the public property in trust, as fiduciaries, to protect the public's interest, with only the state having a superior claim"); Comments of the National Ass'n of Counties at 3, WT Docket No. 16-421 (Mar. 8, 2017) (ROW are "held in trust by local governments to benefit the local community").

[80] *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) ("[W]e conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity[.]"); *see also Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013); *New York State Thruway Auth. v. Level 3 Commc'ns, LLC*, No. 1:10-cv-0154, 2012 U.S. Dist. LEXIS 45051, at *18-19 (N.D.N.Y. Mar. 30, 2012) (considering proprietary exemption in the context of Section 253); *Coastal Commc'ns Serv., Inc. v. City of New York*, 658 F. Supp. 2d 425, 443 (E.D.N.Y. 2009) (same).

[81] *See* Comments of the American Ass'n of State Highway and Transportation Officials at 1, WT Docket No. 16-421 (Mar. 21, 2017).

[82] *See* Cities Comments at 14-15.

I. The Commission Should Not Act on Industry's Fee Arguments.

Industry commenters argue that, to qualify as "fair and reasonable" compensation under Section 253(c), fees charged by municipalities must be limited to costs, or at least cost-based.[83] As we and others have argued, however, "fair and reasonable compensation" cannot be construed to be limited to costs or cost-based fees, as is evident from the plain language and legislative history of Section 253.[84]

Moreover, what industry says it wants—ROW and pole fees that are uniform, predictable and minimal in amount—is flatly inconsistent with its professed desire for truly cost-based fees.[85] A truly cost-based fee structure would vary, potentially widely, not only from locality to locality, but from street to street and from pole to pole within a locality. And actual costs would certainly increase over time, meaning that later-arriving applicants would therefore have to pay more than earlier-arriving applicants.

Local government commenters have introduced expert testimony concerning the economics of ROW pricing.[86] It makes plain that charging a fee for ROW use "helps ensure that the ROW will be used in an efficient manner," and charging a fair market fee (not below-market) helps ensure that external costs are not shifted from private companies to the public and that the ROW will not be overused.[87] Competition—among municipalities, between municipal and

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[83] *See, e.g.*, AT&T Comments at 17; Globalstar at 14; Initial Comments of Lightower Fiber Networks at 29, WT Docket No. 16-421 (Mar. 8, 2017) ("Lightower Comments"); Comments of the U.S. Chamber of Commerce at 3-4, WT Docket No. 16-421 (Mar. 8, 2017); WIA Comments at 19.

[84] Cities Comments at 21-25; Smart Communities Comments at 58-62.

[85] Conterra Broadband goes so far as to say that even having to negotiate reasonable (according to Conterra) fees is a drain on their resources. Comments of Conterra Broadband Services and Uniti Fiber in Response to Public Notice at 19, WT Docket No. 16-421 (Mar. 8, 2017) ("Conterra Broadband Comments").

[86] The Economics of Government Right of Way Fees, Dr. Kevin Cahill, Ph.D., Exhibit 2 to Smart Communities Comments.

[87] *Id.* at 5.

private property, and in the form of elected officials' need to be reelected—operates to control above-market pricing.[88] Market-based pricing will promote rapid deployment that is "consistent with the most efficient use of available resources."[89]

Further, even assuming that the fee structure should be cost-based, there are questions about how costs should be determined, and what counts as a "cost"—questions that industry does not even acknowledge, much less seriously address. For example, the Virginia DOT introduced evidence in its opening comments showing the number of traffic accidents involving collisions with poles in the ROW.[90] The number and severity of these ROW pole crashes prove the basic need to preserve the state or local ROW owner's authority to regulate and control all siting in the ROW. But those same figures also show the difficulty involved in attempting to determine the true economic "cost" of erecting new poles in the ROW. How does one value the increased public safety risk of erecting a new pole—and thus a new obstacle into which vehicles may crash—in the ROW? How does that factor into ROW "cost"? Must a state or locality endure that genuine, but difficult to quantify, cost? Or can it decide that the increased risk to life and property is not worth the benefits of a new pole in the particular ROW location where an applicant wishes to install it? These are not issues that the Commission is remotely competent to resolve, much less resolve on a "one-size-fits-all" basis.[91]

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[88] *Id.* at 6-7.

[89] *Id.* at 13 (additionally noting that Mobilitie's proposed methodology "will predictably lead to inefficient deployment at substantial social cost").

[90] *See* Virginia Utility Pole Collisions, Injuries & Fatalities at 1, Exhibit 1 to VDOT Comments (showing 173 fatalities from 2011-2015 in crashes that involved at least one vehicle hitting a utility pole) ("Ex. 1 to VDOT Comments").

[91] Cities Comments at 20.

Industry commenters also take issue with local governments' use of consultants and the associated consultant fees.[92] Local governments may choose to use consultants to more efficiently process applications. Oakland County, Michigan, for example, reports hiring a consultant to create a database of communications infrastructure, with the goal of allowing wireless carriers to quickly identify collocation opportunities.[93] Why applicants may use consultants (which they often do), yet local governments apparently should not, industry members do not explain. Moreover, where wireless facility applicants claim that, absent grant of the application, a "prohibition" will occur, localities will need radio engineering expertise to assess the validity of that claim—expertise that many localities can most cost-efficiently obtain via contract rather than full-time employees. Given the variety of local government sizes, needs, and staffing across the country, the Commission should not attempt to dictate *how* localities are able to process applications through limitations on fee structures or a presumption against the use of consultants.

J. The Commission Need Not Clarify The "Prohibit or Have the Effect of Prohibiting" Provisions of 253(a) and 332(c)(7).

Industry commenters assert that some courts have interpreted Section 253(a) inconsistently with the Commission's *California Payphone Order*,[94] characterizing the Eighth Circuit's decision in *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), and the Ninth Circuit's decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), as creating a stricter standard for preemption under

[92] *See, e.g.*, Nokia Comments at 12; T-Mobile Comments at 11.

[93] RCOC Comments at 5-6.

[94] *In re Cal. Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d) of the Commc'ns Act of 1934*, CCB Pol 96-26, Memorandum Opinion and Order, 12 FCC Rcd. 14191 (July 17, 1997) ("*California Payphone Order*" or "*California Payphone*").

Section 253(a).[95] Some of these commenters ask the Commission to rule that the preemption standard set out in *California Payphone* applies, while others go so far as to ask the Commission to reinstate the rejected "may prohibit" test announced in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *overruled in Sprint Telephony*, 543 F.3d at 578.[96]

The Commission should reject industry's effort to resurrect *Auburn*'s "may prohibit" test—a test that was subsequently overruled by the court that originally adopted it, rejected by the Eighth Circuit, adopted by no other circuit, and is contrary to the plain language of Section 253(a).[97] No court accepts *Auburn*'s "may prohibit" reading of Section 253(a); to ask the Commission to reinstate it is to ask an unelected agency to overrule the explicit and consistent holdings of the Article III courts that have construed Section 253(a), and to prescribe a standard that is contrary to law.[98]

Nor does the Commission need to make any broad pronouncement reaffirming *California Payphone*. There is no simply no evidence that *any* court disagrees with *California Payphone*, or is interpreting Section 253(a) inconsistently with *California Payphone*.[99] In *California Payphone*, the Commission concluded that state and local action "has the effect of prohibiting" and would be preempted under Section 253(a) when it "materially inhibits or limits the ability of any competitor or potential competitor" to provide telecommunications service. In other words,

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[95] *See, e.g.*, Mobile Future Comments 3-4; AT&T Comments at 36-37.

[96] Lighttower Comments at 18; WIA Comments at 36-37.

[97] *See, e.g.*, *Level 3*, 477 F.3d at 533 ("[N]o reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services . . . ").

[98] *See Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (noting that the FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends") quoted in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

[99] Globalstar, for example, claims that "[t]he federal courts are divided on the meaning" of *California Payphone*'s "materially inhibits or limits" language, yet it provides no cases to back up its conclusion. *See* Globalstar Comments at 10.

a factual showing of prohibitory impact was required, as the regulation must "actually prohibit or effectively prohibit" the provision of services in order to be preempted.[100] The Eighth and Ninth Circuits' interpretation of Section 253(a) in *Level 3* and *Sprint Telephony*, requiring plaintiffs making 253(a) claims to show "effective prohibition, rather than the mere possibility of prohibition," is fully consistent with *California Payphone*'s fact-based standard.[101] Other circuits agree on this interpretation.[102] Moreover, in a brief to the Supreme Court, the Commission itself has acknowledged both that there is no conflict among the circuits on the "prohibition" standard in Section 253(a), and that the Eighth and Ninth Circuits' interpretation of Section 253(a) is consistent with its own.[103]

Industry commenters also argue that the Commission should issue a declaratory ruling concerning the evidentiary standard required to show that the denial of a wireless siting application "prohibits or has the effect of prohibiting" the provision of wireless service under Section 332(c)(7)(B).[104] These commenters ask the Commission to resolve an alleged split among the circuits on the Section 332(c)(7)(B) "prohibition" standard:

> The First, Fourth, and Seventh Circuits have imposed a "heavy burden" of proof to establish a lack of alternative feasible sites, requiring the applicant to show not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try. By contrast, the Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the least intrusive means for filling a coverage gap in light of

[100] *California Payphone Order*, ¶¶ 38, 42.

[101] *Sprint Telephony*, 543 F.3d at 578 (quoting *Level 3*, 477 F.3d at 532-33).

[102] *See, e.g.*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

[103] *See* Brief for the United States as Amicus Curiae at 9, 11, *Level 3 Commc'ns v. City of St. Louis*, 557 U.S. 935 (2009) (Nos. 08-626 and 08-759) ("Nor is there a clear conflict among the circuits on the standard for preemption under Section 253(a) . . . . The Eighth and Ninth Circuits' interpretation of Section 253(a) appears to be consistent with that of the FCC.").

[104] *See, e.g.*, Sprint Comments at 15; Globalstar Comments at 10.

> the aesthetic or other values that the local authority seeks to serve.[105]

Some industry commenters mis-frame the discussion of Section 332(c)(7) evidentiary standards within the context of *California Payphone*, even though *California Payphone* is a Section 253(a) case, not a Section 332(c)(7) case.[106] These comments reveal that industry is conflating Sections 253(a) and 332(c)(7).[107] But only Section 332(c)(7), *not* Section 253, applies to local decisions on small cell/DAS facility siting.[108] Neither provision, however, requires further Commission interpretation at this time.

Industry commenters point to no case where the supposed split in the circuits over the Section 332(c)(7)(B) "prohibition" standard affected the outcome of the case. In fact, it is difficult to see what the difference is between, on the one hand, the burden of proving that the proposed site is the "least intrusive means" and, on the other, the "heavy burden" of showing there are no alternative feasible sites that are less intrusive. And absent identification of any case where these supposedly different standards have resulted in different outcomes, any alleged conflict is illusory. All circuits assign the burden of proof to the complaining applicant. Furthermore, as the Cities previously pointed out, whether a particular action has the effect of prohibiting "the provision of service" is a highly fact-specific inquiry that will differ depending on the circumstances of each particular case. As a result, this inherently case-by-case inquiry is best left to the courts, where Congress intended it to be.

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[105] *Public Notice* at 10-11 (internal quotations and citations omitted).

[106] *See, e.g.*, Globalstar Comments at 10 ("[T]he Commission has previously found that whether a state or locality's actions have the effect of prohibiting the provision of service turns on whether those actions 'materially inhibi[t] or limi[t] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.' [Citing *California Payphone*.] The federal courts are divided on the meaning of this statutory language. Some courts place a heavy evidentiary burden on carriers attempting to meet this test; others shift the burden to states and localities if an applicant demonstrates that its proposed deployment represents the least intrusive available siting approach.").

[107] *See* ExteNet Comments at 44 (acknowledging this confusion).

[108] Cities Comments at 16.

K. Local Governments Should Be Able to Continue to Enforce Zoning and Other Generally Applicable Codes on Eligible Facilities Requests.

A few industry commenters urge the Commission to limit the application of certain generally applicable permitting requirements to applications to install small cell facilities in the ROW.[109] But the Commission determined in the *Spectrum Act Order* that: "States and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."[110] Industry offers no reason why the Commission should revisit this imminently correct decision.

On the contrary, state and local government commenters have shown the importance of subjecting all wireless siting applications to generally applicable health, safety and building codes, and the record supports explicit preservation of these state and local processes.[111] The record here reveals that installing additional facilities in the ROW can have adverse traffic accident consequences.[112] The record also shows that many so-called "small cell" applications include additional pieces of equipment at the particular site, such as power supplies and additional support structures or cabinets, that are not "small" at all.[113] Local government review of any new facilities in the ROW must consider pedestrian access and access by persons with

[109] *See, e.g.*, Crown Castle Comments at 29.

[110] *Spectrum Act Order*, ¶ 188.

[111] And the Fourth Circuit agreed, upholding the *Spectrum Act Order* with the observation that "Section 6409(a) and the Order preserve . . . local authority to condition approval on compliance with 'generally applicable building, structural, electrical, and safety codes' and other public safety laws." *Montgomery County*, 811 F.3d at 131 (citing *Spectrum Act Order,* ¶ 21).

[112] *See* VDOT Comments at 6; Ex. 1 to VDOT Comments; Comments of the Connecticut Department of Transportation at 1, WT Docket No. 16-421 (Mar. 8, 2017) (discussing need to control state highway ROW to protect safety and welfare of the public).

[113] *See* Smart Communities Comments at 12.

disabilities, which may be obstructed by installations.[114] These reviews are crucial to maintaining the balance between public safety, local planning needs, and expeditious wireless facilities deployments—a balancing that the FCC is neither qualified nor authorized to make.

L. Industry Commenters Raise Issues Outside the Public Notice's Scope.

Industry commenters raise a variety of issues that are outside the scope of the *Public Notice*, including the scope of historic preservation and environmental reviews,[115] rules applicable to fiber,[116] and specific reforms related to macrocells.[117] The Commission should decline to take any action in this proceeding with regard to these and other issues outside the scope of the *Public Notice* and the Mobilitie Petition.

III. CONCLUSION

For the reasons discussed above, as well as those set forth in the Cities' opening comments and in the comments of other local government interests, the Commission should deny the Mobilitie Petition and refrain from taking any further action in this docket.

[114] *See id.* at 5.

[115] *See, e.g.*, CCA Comments at 35-44; CTIA Comments at 47-49; Sprint Comments at 44-47; Verizon Comments at 33-39.

[116] Conterra Broadband Comments at 11-14.

[117] Comments of NTCH, Inc. at 1, 4, 8, WT Docket No. 16-421 (Mar. 8, 2017).

Respectfully submitted,

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April 7, 2017

EXHIBIT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment:	)	
Expanding the Reach and	)	
Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way	)	
and Wireless Facilities Siting	)	

COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

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July 18, 2011

TABLE OF CONTENTS

SUMMARY

San Antonio, with approximately 1.3 million residents, is the second largest city in Texas, and the seventh largest city in the nation. Both landline and wireless broadband, from multiple competitive providers, are available throughout San Antonio. In fact, both landline and wireless broadband are far more ubiquitously and competitively available in San Antonio than in most areas across the nation with far less demanding, and in some cases non-existent, ROW and zoning requirements.

At the same time, pursuant to Texas law and the City Charter, San Antonio has, for over a century, imposed rent-based compensation on private entities that install facilities in the City's rights-of-way (ROW), including ROW use by telecommunications, cable and broadband providers (among others). ROW compensation from private sector telecom and cable providers is the third-largest source of City revenue, exclusive of the City's municipal utilities.

These facts lead ineluctably to two conclusions.

First, San Antonio's non-cost-based ROW compensation requirements, as well as its ROW management practices and wireless siting zoning requirements, are *not* an impediment to broadband deployment or adoption.

Second, any FCC action that would in any way reduce local ROW compensation requirements would have severe adverse effects on the City's budget, threatening its ability to provide essential public services to its residents. And since broadband is already universally and competitively deployed in San Antonio, the effect of reducing the City's ROW compensation revenue would not be increased deployment, but simply a monetary transfer from the City and its taxpayers to broadband providers' executives and shareholders.

Thus, even if the FCC had legal authority to adopt the various proposals set forth in the *NOI* (and it does not), those proposals would not serve the broadband goals the FCC seeks to achieve. They would instead do serious damage to the fiscal health of our nations' local governments and to the integrity of local land use policy by interfering with fundamental local police powers relating to ROW use, land use and public safety - - all just to line the already well-lined pockets of broadband providers.

But the FCC has no legal authority to implement the *NOI's* proposals. That underscores Congress' wisdom in precluding a distant, unelected FCC from meddling in these critical, and intensely local, ROW and land use matters, with which the FCC has no familiarity, much less expertise.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	))))))	WC Docket No. 11-59

COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

The City of San Antonio, Texas ("City" or "San Antonio"), files these comments in response to Notice of Inquiry ("*NOI*"), 26 FCC Rcd 5384, released April 7, 2011, in the above-captioned proceeding.

San Antonio supports the comments of the National League of Cities, *et al.*, the comments of the Texas Municipal League, *et al.*, and the comments of other local government interests filed in this proceeding. The City supplements those comments as follows.

INTRODUCTION

San Antonio, with approximately 1.3 million residents, is the second largest city in Texas, and the seventh largest city in the nation. Both landline and wireless broadband, from multiple competitive providers, are available throughout San Antonio. In fact, both landline and wireless broadband are far more ubiquitously and competitively available in San Antonio than in many, especially rural, areas across the nation with far less demanding, and in some cases non-existent, ROW and zoning requirements. At the same time, pursuant to Texas law and the City Charter, San Antonio has, for over a century, imposed rent-based compensation on private entities that install facilities in the City's rights-of-way (ROW), including ROW use by

telecommunications, cable and broadband providers (among others). Indeed, ROW compensation from private sector telecom and cable providers is the third-largest source of City revenue, exclusive of the City's municipal utilities.

These facts lead ineluctably to two conclusions. *First*, San Antonio's non-cost-based ROW compensation requirements, as well as its ROW management practices and wireless siting zoning requirements, are *not* an impediment to broadband deployment or adoption. *Second*, any FCC action that would in any way reduce local ROW compensation requirements would have severe adverse effects on the City's budget, threatening the City's ability to provide essential public services to its residents. And since broadband is already virtually universally deployed in San Antonio, the effect of reducing the City's ROW compensation revenue would not be increased deployment, but simply a monetary transfer from the City and its taxpayers to broadband providers' executives and shareholders.

Thus, even if the FCC had legal authority to adopt the various proposals set forth in the *NOI* (at ¶¶ 52-58), those proposals would not serve the broadband goals the FCC seeks to achieve. They would instead do serious damage to the fiscal health of our nation's local governments and to the integrity of local land use policy by interfering with fundamental local police powers relating to ROW use, land use and public safety - - all just to line the already well-lined pockets of broadband providers.

But the FCC has no legal authority to implement the *NOI's* proposals. That underscores Congress' wisdom in precluding a distant, unelected FCC from meddling in these critical, and intensely local, ROW and land use matters, with which the FCC has no familiarity, much less expertise.

I. THE *NOI* NEGLECTS THE VITAL INTERESTS SERVED BY LOCAL RIGHTS-OF-WAY AND ZONING REQUIREMENTS.

The *NOI* (at ¶ 12) asks a wealth of questions about six "broad categories" of what it deems are the relevant "right-of-way and wireless facilities siting issues" and how those issues "influence buildout and adoption of broadband and other communications services." Conspicuously absent from the *NOI*, however, is any apparent interest or request for data concerning the impact of any FCC limitation on current ROW practices or land use requirements might have on local governments, their budgets, their ROW infrastructure, or local governments' residents or the neighborhoods those residents live in.

Instead, the *NOI's* focus seems to be entirely on gathering and assessing data about ROW and land use practices solely through the lens of their potential effect on the business interests of broadband and other communications service providers, largely turning a blind eye to the unique non-communications-related interests those practices may serve in each particular community, and the impact any federal interference with local ROW and zoning practices might have on local governments and their residents. This bias is perhaps most glaringly revealed in the description of the six "broad categories" into which the *NOI* states (at ¶12) "rights of way and wireless facilities siting issues" may be distilled - - each of which is focused only on the economic interests of broadband providers and what effect local ROW and zoning practices may have on them, and *none* of which is directed at the non-communications-related interests served by ROW or zoning requirements, and how important those requirements may be to local governments and the local residents they serve.

The *NOI's* professed concern (*id.*) about the "presence or absence of uniformity due to inconsistent or varying [ROW and zoning] practices and rates in different jurisdictions or areas" is particularly troubling. That local ROW and zoning practices may vary from local jurisdiction

to local jurisdiction is neither surprising nor objectionable. Local ROW practices vary because the many factors relevant in developing such practices - - topographical, soil and weather conditions; the varying nature of neighborhoods in each community; the cost of labor, materials, and real property; the economic value of the ROW to private users; municipal charter provisions; and state law - - vary considerably from community to community. Land use laws likewise necessarily vary from community to community due to different aesthetics and historical issues in each neighborhood in a community, and each local community's judgment about the proper balance between development and preservation. And there is nothing improper about that.

In fact, the *NOI's* apparent concern about the lack of uniformity in local ROW and land use requirements is at war not only with fundamental principles of federalism, but with Congress' desire to preserve and protect local ROW and zoning authority reflected in Sections 253(c) and 332(c)(7). *See* Part VI, *infra*. San Antonio is therefore concerned that by asking the wrong questions, the *NOI* may generate misleading and wrong results.

II. RIGHT-OF-WAY COMPENSATION IS A CRITICAL SOURCE OF REVENUE FOR SAN ANTONIO.

Although largely ignored in the *NOI*, for San Antonio, like many local governments across the nation, ROW compensation is a crucial source of revenue, without which it could not provide the key public services that its residents demand.

For over a century, San Antonio has received rent-based ROW compensation from all persons who install private profit-making facilities in the City's ROW. Consistent with Texas law,[1] the City currently imposes a per-access-line fee on all telecommunications service providers certificated by the Texas Public Utilities Commission ("PUC") that install facilities in

[1] Tex. Local Govt. Code Ann., Title 9, Chapt. 283.

the ROW. Consistent with the Cable Act[2] and Texas law,[3] the City imposes a ROW fee of 5% of gross revenues on all cable and video service providers that install facilities in the City's ROW.

In San Antonio, total franchise fee revenues from ROW use were nearly $31 million in 2010. That represents the third-largest source of City revenue, exclusive of the City's municipal utilities' contribution. Telecommunications service ROW fees alone represent the fourth-largest revenue source in the City's budget (again, exclusive of the City's municipal utilities' contribution).

Any loss of, or large reduction in, this revenue source would have a crippling effect on the City's budget - - a budget that, much like the budgets of other local governments nationwide, has already been hit hard by the economic downturn. Because, like virtually all cities, San Antonio must balance its budget, any loss of ROW fee revenue would necessarily result in a reduction in City services to residents (and a likely commensurate loss in jobs), an increase in other taxes or fees, or some combination of both.

III. BROADBAND IS WIDELY AND COMPETITIVELY DEPLOYED IN SAN ANTONIO.

San Antonio's ROW compensation and management practices, as well as its land use/zoning practices, have not adversely affected broadband deployment at all. To the contrary, broadband is universally, and competitively, deployed in San Antonio - - something that cannot be said of many rural areas in Texas and nationwide, despite the fact that those areas almost invariably have less rigorous - - and indeed, often non-existent - - ROW and zoning requirements.

[2] 47 U.S.C. § 542.
[3] Tex. Util. Code Ann. § 66.005.

A. Landline Broadband.

Time Warner and AT&T have deployed broadband virtually throughout San Antonio. In addition, Grande Communications – a competitive, franchised video service provider – also provides broadband in many parts of the City, and some CLECs do as well. In fact, according to broadbandmap.gov, 99.1% of San Antonio's population has access to landline broadband.[4] Moreover, 81.9% of San Antonio residents have access to at least two landline broadband providers, compared to only 47.7% of the population nationwide.[5]

B. Wireless Broadband.

The story is much the same with respect to wireless broadband. Broadbandmap.com reveals that 64.8% of San Antonio's population has access to seven wireless broadband providers, and an additional 12.1% of San Antonio's population has access to eight or more wireless broadband providers.[6] These figures likewise compare quite favorably with the nationwide figures at 4.3% and 5.0%, respectively.[7]

C. Local Right-of-Way and Zoning Requirements Do Not Adversely Affect Broadband Deployment.

As both the FCC's latest *2011 Rural Broadband Report*[8] and broadbandmap.gov[9] reveal, broadband deployment and adoption in rural areas lags considerably behind broadband deployment and adoption in non-rural areas. Nationwide, only 3% of the population in non-rural areas lacks access to 3Mbps/768Kbps broadband, while 27% of the population in rural areas

[4] *See* www.broadbandmap.gov/summarize/state/texas/census-places/san-antonio.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] FCC, *Bringing Broadband to Rural America: Update to Report on Rural Broadband Strategy*, GN Docket No. 11-16, at pp. 6-7 & App. B (June 17, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0622/DOC-307877A1.pdf ("*2011 Rural Broadband Report*").
[9] NTIA and FCC, *Broadband Statistics Report, available at* http://www.broadbandmap.gov/download/reports/national-broadband-map-broadband-availability-in-rural-vs-urban-areas.pdf.

lacks access to such broadband.[10] In the case of wireless broadband, rural areas also lack the coverage, and the competitive alternatives, that non-rural areas enjoy.[11]

The same pattern holds true in Texas. 99.1% of Texas' non-rural population has access to 3Mbps/768Kbps service, while only 76% of Texas' rural population does.[12] This non-rural/rural differential is no small matter, especially in Texas. Due to Texas' large geographic size and population, it has the largest number of residents living in rural areas - - over 4.3 million - - of any state in the nation.[13]

In Texas, as we suspect is the case in most states, ROW compensation and management requirements, as well as local land use/zoning requirements, tend to be more demanding in urban and suburban areas than in rural areas. That is unquestionably true with respect to ROW compensation, as Texas law empowers cities to impose ROW compensation but does not empower counties to do so in their unincorporated areas.[14]

Thus, in Texas, as we suspect is true elsewhere, broadband is largely deployed in urban/suburban areas but much less widely deployed in rural areas. Yet it is the urban/suburban areas, not the rural areas, that impose the greater ROW and local zoning requirements about which broadband providers complain.

This fact pattern leads to two key conclusions, each of which undermines any justification for any FCC action in the areas of local ROW or zoning requirements.

First, that broadband deployment is greater - - indeed, all but universal - - in urban/suburban areas like San Antonio with more demanding ROW and zoning requirements,

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[10] *2011 Rural Broadband Report* at ¶ 10.
[11] *See id.* at pp. 6-7 & n.29 and *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services* (rel. June 27, 2011), FCC 11-103, at pp. 219-220.
[12] *2011 Rural Broadband Report* at App. B, p. 24.
[13] *See id.* at pp. 22-24.
[14] *See* Tex. Local Govt. Code Ann., Title 9, Chapt. 283; Tex. Util. Code Ann., Title 4, Chapt. 181.

and much lower in rural areas despite the far more lenient, and in many cases, non-existent ROW and zoning requirements in such areas, refutes any claim that local ROW and zoning requirements are any significant impediment at all to broadband deployment. The primary impediment to broadband deployment is instead on the expected revenue side of broadband providers' investment decision equation: low potential subscriber density in rural areas means low anticipated revenue return per dollar of investment there.

Second, in any area like San Antonio, where broadband is already ubiquitously and competitively deployed, any FCC preemption, or limitation, of local ROW or zoning requirements would yield only a windfall to broadband providers and their shareholders, at the expense of local communities and their residents, with no increase in broadband deployment.

IV. WIRELESS PROVIDERS HAVE ON OCCASION MISUSED THE FCC'S *SHOT CLOCK RULING.*

The *NOI* (at ¶¶ 13-15) seeks information on local governments' experience with the FCC's *Shot Clock Ruling*.[15] San Antonio believes it is far too soon to assess reliably the impact of the *Shot Clock Ruling* on the City's land use practices and procedures, and on its budget. The City was already quite accommodating in issuing permits for wireless facilities before the *Shot Clock Ruling* was adopted. For example, the City issued 220 collocation permits to Clearwire alone during 2009-2010, which it used to build a 4-G wireless broadband network throughout San Antonio.

Two recent experiences, however, have caused the City some concern that wireless providers may view the *Shot Clock Ruling* as a justification for short-circuiting the City's zoning process and for seeking special, privileged treatment in that process.

[15] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, Declaratory Ruling, 24 FCC Rcd 2009) ("*Shot Clock Ruling*"), *petits. for review pending sub nom. City of Arlington et al. v. FCC*, No. 10-60039 (5th Cir.)

Under the City's land use law, collocation applications are granted as of right, provided that the application satisfies the requirements of being a genuine collocation, including engineering certification that the wireless tower is structurally sound to withstand the added stress on the tower resulting from mounting additional equipment and cables. Applications to increase a tower's height, however, are not collocations under the City's land use law but are instead subject to the City's current zoning regulations and application process. Verizon Wireless' contractor recently filed what it claimed was a collocation application. City staff review, however, revealed that in addition to collocation, Verizon Wireless was seeking an increase in tower height. The City so informed Verizon Wireless, and it revised its application accordingly. In this particular case, the wireless tower in question, originally constructed in 1971, is nonconforming to existing zoning regulations. The requested change in the tower structure therefore requires compliance with the City's current zoning regulations. As a result, the tower must meet a 200 foot setback requirement, which it does. The application, however, must meet other current zoning requirements as well. Because the area where the tower is located is currently zoned residential, the proposed change in use (taller tower to accommodate collocation) requires re-zoning approval by the San Antonio Zoning Commission and City Council. The application is now pending before the City Council.

City land use law also requires that any permit or land use application in the Edwards Aquifer Overlay Zone must meet special requirements to ensure that runoff from facilities constructed in that zone do not contaminate the Edwards Aquifer, a vital water source for the City and surrounding areas. Verizon Wireless has taken the position with City staff that wireless facilities installed in the Edwards Aquifer Overlay Zone, unlike all other land use applications in that zone, should be exempt from the special water contamination prevention requirements of

that zone. The City is concerned that Verizon Wireless' position might reflect wireless providers' view that the *Shot Clock Ruling* entitles them to special exemptions from local land use requirements.

V. THE *NOI*'S SUGGESTION THAT RIGHT-OF-WAY COMPENSATION MIGHT BE "EXCESSIVE" OR REFLECT "MARKET POWER" IS WRONG, BOTH FACTUALLY AND LEGALLY.

The *NOI* (at ¶¶ 16-20) asks several questions concerning the "reasonableness" of charges for ROW use and wireless siting. San Antonio finds many of these questions troubling, primarily because they seem to be predicated on a fundamental lack of knowledge about the nature of such charges and the built-in checks and safeguards that ensure their reasonableness.

With respect to wireless siting, neither the ROW nor other City property can fairly be described as an essential facility. San Antonio charges rent for wireless facilities located on City property. Most wireless facilities, of course, are located on private property, and like the City, private property owners also charge rent for wireless providers' use of their property. Thus, wireless providers have both public and private property alternatives for siting their facilities, and that constrains the rental rates any property owner may charge.

In the case of ROW use charges, the *NOI* overlooks the many safeguards in place to protect against any "unreasonable" or " market power"-based ROW fees.

First, in some states, state law sets a ceiling on the ROW franchise fee rate that a locality may impose. That is the case in Texas, which sets a maximum per-access line-based fee that municipalities may impose on telecommunication providers certificated by the Texas PUC.[16]

Second, ROW compensation levels set by local governments are subject to the ultimate check: voters. Unlike the case with private sector actors owning essential facilities, where

[16] *See* Tex. Local Govt. Code Ann. § 283. 055.

customers have little or no recourse in responding to excessive rates other than to forgo service, elected local government officials must be responsive to their constituents - - most of whom are also paying customers of broadband and telecommunication services - - in setting ROW compensation rates. Moreover, due to industry's propensity for itemizing ROW fees and all other government-related costs of doing business on their subscribers' bills, ROW fees are fully transparent to voters. If voters believe that the ROW fees their elected officials have adopted are excessive, they have a ready remedy - - the ballot box. That is a far more effective, and far more democratic, safeguard than any intrusive, preemptive action by a distant, unelected federal agency like the FCC which has no knowledge or expertise at all about local ROW compensation.

Finally, the *NOI*'s apparent concern about local governments' possible exercise of supposed "market power" in setting ROW compensation rests on the erroneous and insulting assumption that local elected officials and staff are either ignorant of, or are not interested in, the many economic, educational, health-related and other benefits that widespread availability and adoption of broadband service can bring to their communities. Nothing could be further from the truth.

In fact, San Antonio's recent efforts to work out mutually acceptable arrangements with a Distributed Antenna Service ("DAS") provider for access to City ROW and City utility-owned utility poles illustrate the flexibility and accommodation that the City provides to promote broadband availability. Because the DAS provider approaching the City was providing wireless service to an incumbent wireless carrier rather than to end-users, it was not eligible to access City ROW by paying the per-access line ROW fees pursuant to Chapter 283 of the Texas Government Code. The City originally proposed a per-foot ROW fee to the DAS provider, but the DAS provider informed the City that a per-foot fee did not fit with its business model and

would make that model infeasible. The City therefore worked with the DAS provider to reach a mutually acceptable alternative ROW compensation arrangement: 5% of the DAS provider's gross revenue in the City plus the grant to the City of an Indefeasible Right of Use ("IRU") for six free fibers for the fiber route deployed by the DAS provider. This mechanism greatly reduced the ROW compensation that the DAS provider would have to pay vis-à-vis the per-foot ROW fee and, as the DAS provider desired, transformed ROW compensation from a fixed cost into an incremental cost that made its business plan more economically feasible.

But San Antonio did more than just negotiate a mutually acceptable ROW compensation arrangement with the DAS provider. The City's electric utility, CPS Energy ("CPS"), also worked with the DAS provider to carry out a trial installation of DAS facilities on CPS poles to make sure the installation met all safety requirements. To accommodate DAS facilities, CPS also agreed to install taller poles in areas where the DAS provider requested.

The point is that San Antonio, like most municipalities, has a very significant interest in promoting the widespread availability of broadband services to its residents and businesses, and it therefore endeavors to be flexible and responsive to providers' concerns in developing and applying its ROW and land use policies. Unlike a private sector business, the City is not a simple profit-maximizer; the City has no desire to restrict output of services to its residents to increase its revenues. A municipality does not - - indeed, politically cannot - - simply maximize its short-term revenues at the expense of reducing the availability of critical services like broadband to its residents and businesses. At the same time, the City does have to receive sufficient revenues to provide the public safety and other vital public services its residents demand. That is a delicate balancing process that only elected government officials should

make, and not one that a single-purpose, unelected federal agency like the FCC should intrude upon or second-guess.

VI. THE *NOI*'S SUGGESTION THAT THE FCC HAS AUTHORITY TO INTRUDE INTO SECTION 253(c) RIGHT-OF-WAY COMPENSATION ISSUES OR NON-RF-RELATED WIRELESS SITING MATTERS UNDER SECTION 332(c)(7) IS WRONG AS A LEGAL AND A POLICY MATTER.

The *NOI* states (at ¶¶ 51-58) that the FCC believes it has legal authority to construe, via rulemaking or otherwise, Sections 253 and 332(c)(7) to "improve rights of way and wireless facilities siting governance," and to adjudicate rights of way disputes under Section 253. The *NOI* is mistaken; Sections 253 and 332(c)(7) deny the FCC such authority.

A. The FCC Lacks Legal Authority To Engage in Rulemaking or Adjudicate Disputes Concerning Right-of-Way Compensation or Management Under Section 253.

The *NOI*'s suggestion that the FCC has authority to construe the ROW provisions of Section 253(c) via rulemaking and to adjudicate ROW disputes under Section 253(c) ignores the clear statutory language and legislative history to the contrary. Congress intended that ROW compensation and management disputes under § 253(c) were to be left to the courts, not the FCC.

1. Section 253 Does Not Apply to Non-Telecommunications Services Like Broadband.

As a threshold matter, the *NOI* overlooks that Section 253(a) only applies to state or local laws, regulations or requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service*." (Emphasis added.) Thus, on its face, Section 253(a) does *not* apply to state or local requirements that may have such an effect on the provision of *non*-telecommunications services. And broadband,

which the FCC has classified as an "information service," is just such a non-telecommunications service.[17]

Contrary to the *NOI*'s suggestion (at ¶¶ 52 & 56-58), the FCC cannot rely on § 706 or on its general authority provisions in the Act (§§ 1, 4(i), 201(b) and 303(r)) to transform § 253's language into a provision about non-telecommunications services like broadband.

As the D.C. Circuit recently made clear in *Comcast*,[18] Section 706 "does not delegate any regulatory authority" to the FCC. More fundamentally, the *NOI* makes no effort, nor is it apparent what effort would be sufficient, to stretch the FCC's Title I ancillary jurisdiction over broadband into the ability to rewrite § 253 to apply to broadband services. As was the case in *Comcast*, the *NOI* does not, and cannot, establish that its proposed extension of § 253 to broadband is "reasonably ancillary to the Commission's performance of its statutory mandated responsibilities."[19] And it would be strange, if not downright hypocritical, for the FCC to free broadband providers of the obligations of Title II by classifying their services as Title I information services while, at the same time, applying to Title I broadband providers one particular Title II provision – Section 253 – that provides a special benefit to Title II carriers.

Moreover, any FCC effort to extend the preemption reach of § 253 beyond its text to broadband services would run afoul of yet another well-established principle: The FCC may not preempt state or local laws absent a "clear statement" in the Act granting it such authority.[20] Here, on its face, Section 253 only permits preemption in the limited circumstances set forth in § 253(a), and those circumstances are restricted to state or local requirements prohibiting the provision of "telecommunications services," which the FCC has ruled broadband services are

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[17] *See, e.g., NCTA v. Brand X Internet Services, Inc.*, 545 U.S. 967 (2005).
[18] *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010).
[19] *Comcast*, 600 F.3d at 644 (quoting *American Library Assn. v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).
[20] *City of Dallas v. FCC*, 165 F.3d 341, 347-348 (5th Cir. 1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

not. Neither § 253 nor any other provision of the Act contains a "clear statement" granting the FCC authority to preempt local ROW requirements relating to broadband services.

2. Section 253(d) Deprives the FCC of Jurisdiction Over Section 253(c) Right-of-Way Matters.

Section 253(d) gives the FCC authority to address alleged violations of § 253(a) and (b), but *not* ROW matters under § 253(c). This was no accident or oversight. To the contrary, Section 253(d)'s omission of Section 253(c) ROW matters was the product of a compromise amendment sponsored by Senator Gorton that was explicitly designed and intended to bar the FCC from § 253(c) ROW matters.[21] "[A]ny challenge to [local ROW requirements must] take place in the Federal district court in that locality and … the Federal Communications Commission [should] not be able to preempt [local ROW requirements]."[22]

3. "Fair and Reasonable" Right-of-Way Compensation under Section 253(c) Encompasses Rent-Based Compensation.

Even assuming *arguendo* that the Commission had any jurisdiction to construe § 253(c), any suggestion that "fair and reasonable" ROW compensation must be restricted, or closely related, to costs is not only at odds with § 253(c)'s language and legislature history, but also would embroil courts, the Commission, local governments and telecommunications providers in precisely the type of tedious and intrusive right-of-way compensation ratemaking proceedings that Congress intended § 253(c) to avoid.

The *NOI* makes no serious effort to assess the plain-language meaning of the phrase "fair and reasonable compensation" in § 253(c). Certainly the common and ordinary meaning of "fair and reasonable compensation" does not connote mere reimbursement of costs. *Black's Law Dictionary* at 283 (6th ed. 1991), for instance, defines the term "compensation" to mean

[21] 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (remarks of Senator Gorton).
[22] *Id.*

" . . . payment of damages; making amends; making whole; giving an equivalent or substitute of equal value . . . . Consideration or price of a privilege purchased . . . giving back an equivalent in either money which is but the measure of value . . . recompense in value." And *Black's Law Dictionary* at 277 (7th ed. 1999), defines the terms "just compensation" and "adequate compensation" for use of property as "the property's *fair market value*." (Emphasis added.)

In common parlance, "fair and reasonable compensation," means more than mere cost recovery.[23] It is difficult to believe, for example, that if a municipal government were selling a parcel of land or a vehicle, or leasing office space in a municipal building, any "compensation" the municipality receives for that property would have to be limited to, or demonstrably related to, cost recovery, rather than fair market value. Likewise, we seriously doubt that broadband providers would contend that they are entitled only to cost recovery, rather than the prices they charge, as "fair and reasonable compensation" for the services they render.

In enacting § 253(c), Congress is of course presumed to be aware of previous interpretations of similar language. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Precedent construing analogous terms fully supports the district court's construction of "compensation." The Takings Clause of the Fifth Amendment, for instance, contains the very similar phrase "just compensation." And the law is clear that the "compensation" to which a person is entitled under the Takings Clause is not mere reimbursement of costs, but fair market value. *United States v.*

[23] Although the Second Circuit suggested that the "statutory language is not dispositive," that court also observed that "payment of rent as 'compensation' for the use of property does not strain the ordinary meanings of any of the words," "commercial rental agreements commonly use gross revenue fees as part of the price term," and "Congress's choice of the term 'compensation' may suggest that gross revenue fees are permissible" under § 253(c). *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002). Moreover, the only example that *White Plains* gave for "compensation" being synonymous with costs – "'compensatory' damages in tort are designed to precisely offset the costs . . . inflicted by the tort," *id*. – actually supports our reading of "compensation," since compensatory damages clearly can include lost profits. *E.g.*, *Humetrix, Inc. v. Gemplus S.C.A*, 268 F.3d 910, 918-19 (9th Cir. 2001); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 821 & n. 6 (9th Cir. 2001); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001).

50 Acres of Land, 469 U.S. 24, 29 (1984). The law is equally clear that local governments, no less than private parties, are entitled to fair market value as "compensation" under the Takings Clause. *Id.* at 31 & n. 15.

Moreover, § 253(c) was enacted against a backdrop of abundant precedent establishing that the "compensation" to which municipalities have historically been entitled from private businesses, like telecommunications providers, that place permanent, extensive facilities in the ROW is rent in the form of franchise fees. In the directly analogous context of cable television franchise fees, for example, the Fifth Circuit held that the 5% franchise fee permitted by 47 U.S.C. § 542 is "essentially a form of rent: the price paid to rent use of rights-of-way." *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997). More generally, other courts across the nation, including the Supreme Court, have consistently reached the same conclusion for over one hundred years, in the context of both local telephone and local cable television franchises.[24]

Viewed, as it must be, against the plain meaning of "compensation" and the historical backdrop of rent-based franchise fees as a permissible form of "compensation" for use of local rights-of-way, there is simply nothing in the language of § 253(c) (or elsewhere in the Commissions Act, for that matter) remotely suggesting that Congress intended that provision to alter historical ROW compensation methods radically, much less to upset preexisting state laws authorizing rent-based ROW fees.

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[24] *E.g.*, *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98 (1893) (franchise fee is rent for use of local rights-of-way); *City of Plano v. Public Utilities Commission*, 953 S.W.2d 416, 420 (Tex. App. 1997) (gross receipts-based franchise fee is rent for use of local rights-of-way); *City of Albuquerque v. New Mexico Public Service Commission*, 854 P.2d 348, 360 (N.M. 1993) (same); *City of Montrose v. Pub. Utilities Comm'n*, 629 P.2d 619, 624 (Colo. 1981), *related proceeding*, 732 P.2d 1181 (Colo. 1987) (same); *City of Richmond v. Chesapeake & Potomac Tel. Co. of Va.*, 140 S.E.2d 683, 687 (Va. 1965) (same); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 282 P.2d 36, 43 (Cal. 1955) (same); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), *rehearing denied*, 679 F. Supp. 977, 979 (1988) (same); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) (same).

The legislative history unequivocally confirms that Congress specifically intended § 253(c) to preserve the historical practice of rent-based ROW fees. The legislative history of the Barton-Stupak amendment in the House of Representatives is the key to understanding the meaning of "fair and reasonable compensation" in § 253(c).[25] And if there is one conclusion on which both the proponents *and* the unsuccessful opponents of the Barton-Stupak amendment agreed, it was that rent-based fees were a permissible form of "compensation" under what is now § 253(c). The debate began with Rep. Barton, one of the amendment's sponsors, who made clear that one of the primary purposes of the amendment was to prevent the federal government from telling local governments how to set compensation levels for local rights-of-way:

> "[The Barton-Stupak amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, *but also to set the compensation level for the use of that right-of-way* . . . . The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. *The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way*."[26]

Rep. Fields then rose in opposition to the amendment, complaining that it would allow municipalities to impose on telecommunications providers what he felt were excessive ROW fees in the range of "up to 11% percent." *Id.* at H8461 (remarks of Rep. Fields). The amendment's other sponsor, Rep. Stupak, replied, defending rent-based fees:

> "Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their

[25] *See New Jersey Payphone Assn. v. Town of West New York,* 299 F.3d 235, 246-47 n.7 (3rd Cir. 2002) (relying on the Barton-Stupak floor debate to interpret § 253(c)); *White Plains,* 305 F.3d at 80 (relying on Barton-Stupak amendment's elimination of "parity" provision to construe § 253(c)).

[26] 141 Cong. Record H8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton) (emphasis added).

> nose out of it . . . . This is a local control amendment, supported by mayors, State legislatures, counties, Governors."[27]

Finally, and perhaps most revealingly, Rep. Bliley spoke in opposition to the Barton-Stupak amendment. Mr. Bliley's remarks make clear that neither the Barton-Stupak amendment, nor even the "parity language" that it replaced, was intended to preempt rent-based fees:

> "I commend the gentleman from Texas [Mr. Barton], I commend the gentleman from Michigan [Mr. Stupak] who worked tirelessly to try to negotiate an agreement.
>
> The cities came back and said 10 percent gross receipts tax. Finally they made a big concession, 8 percent gross receipts tax. What we say is charge what you will, but do not discriminate. If you charge the cable company 8 percent, charge the phone company 8 percent, but do not discriminate. That is what they do here, and that is wrong."[28]

Two conclusions are apparent: First, both proponents and opponents of the Barton-Stupak amendment agreed that the amendment permitted rent-based right-of-way fees and eliminated federal second-guessing of the reasonableness of locally set fees. Second, the House certainly did not share Rep. Field's distaste for rent-based fees, for after hearing his concerns, it overwhelmingly adopted the Barton-Stupak amendment by a 338 to 86 vote. *Id.* at H8477 (recorded vote).

In short, to construe "fair and reasonable compensation" in § 253(c) as not encompassing rent-based fees would improperly subvert the clear will of Congress, as evidenced by § 253(c)'s plain language and legislative history.

[27] *ld.* at H846l (remarks of Rep. Stupak).
[28] *Id*. (remarks of Rep. Bliley).

B. The FCC Lacks Authority to Construe or Adjudicate the Non-RF-Related Provisions of § 332(c)(7).

As the Commission is no doubt aware, San Antonio argued in the *Shot Clock* proceeding, and is currently arguing in the pending appeal of the *Shot Clock Ruling*, that Section 332(c)(7)(A) & 332(c)(7)(B)(v) explicitly bar the FCC from construing, adjudicating or enforcing any of the non-radiofrequency ("RF")-related provisions of Section 332(c)(7)(B).[29] We will not repeat those arguments here, but merely incorporate by reference the San Antonio Opposition and San Antonio Reply Comments filed in the *Shot Clock* proceeding, WT Docket No. 08-165.

C. Even if the FCC Had Legal Authority To Construe or Enforce Section 253(c) or 332(c)(7)(B), It Would Be Unsound Policy To Do So.

Even if the FCC has the authority to construe, adjudicate or enforce Section 253(c) or 332(c)(7)(B) as the *NOI* suggests (which it does not), it would be imprudent for the FCC to do so. ROW and zoning matters are inherently fact-intensive and reflect unique local conditions and interests. In particular, ROW and zoning requirements necessarily reflect a balancing of other vital governmental interests - - from public safety, to efficient transportation, to historical preservation, to the fiscal health of local governments - - beyond simply promoting the widespread availability of broadband. The FCC has no expertise or understanding of, and thus no reasoned way of balancing, these interests against the interest in promoting broadband. Yet such a balancing is precisely what § 253(c) and § 332(c)(7), by their terms, require.

[29] *See* Opposition of the City of San Antonio, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165 ("*Shot Clock* proceeding") (filed Sept. 29, 2008); Reply Comments of the City of San Antonio (filed Oct. 14, 2008); Declaratory Ruling, *Shot Clock* proceeding, 24 FCC Rcd 13994 (2009), *petitions for review pending sub nom. City of Arlington, Texas v. FCC*, No. 10-60039 (5th Cir. filed Jan. 14, 2010).

There simply is no "one size fits all" federal solution. That is why ROW disputes under § 253(c) and non-RF-related wireless siting disputes under § 332(c)(7) are best left to the courts. Courts are the only reviewing bodies having familiarity with all of the interests at stake, and the ability to find and weigh the specific facts of each case.

CONCLUSION

For the foregoing reasons, the Commission should find that local ROW and zoning requirements are no obstacle to broadband deployment that would justify any FCC action. After making such a finding, the Commission should terminate this proceeding.

Respectfully submitted,

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Of Counsel

July 18, 2011

EXHIBIT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment:	)	
Expanding the Reach and	)	
Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way	)	
and Wireless Facilities Siting	)	

COMMENTS OF THE CITY OF EUGENE, OREGON

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July 18, 2011

TABLE OF CONTENTS

SUMMARY

Eugene, with over 155,000 residents, is the second-largest city in Oregon. Both landline and wireless broadband, from multiple competitive providers, are available throughout Eugene. In fact, both landline and wireless broadband are far more ubiquitously and competitively available in Eugene than in most areas across the nation with lesser, and in some cases non-existent, ROW and zoning requirements.

At the same time, pursuant to Oregon law and City ordinance, Eugene has long imposed gross revenue-based compensation on private entities that install facilities in the City's rights-of-way (ROW), including ROW use by telecommunications, cable and broadband providers (among others). ROW compensation from private sector telecom and cable providers is the fourth-largest source of City General Fund revenue, exclusive of the City's municipal utility.

These facts lead ineluctably to two conclusions.

First, Eugene's gross revenue-based ROW compensation requirements, as well as its ROW management practices and wireless siting zoning requirements, are *not* an impediment to broadband deployment or adoption.

Second, any FCC action that would in any way reduce local ROW compensation requirements would have severe adverse effects on the City's budget, threatening its ability to provide essential public services to its residents. And since broadband is already universally and competitively deployed in Eugene, the effect of reducing the City's ROW compensation revenue would not be increased deployment, but simply a monetary transfer from the City and its residents to broadband providers' executives and shareholders.

Thus, even if the FCC had legal authority to adopt the various proposals set forth in the *NOI* (and it does not), those proposals would not serve the broadband goals the FCC seeks to

achieve. They would instead do serious damage to the fiscal health of our nation's local governments and to the integrity of local land use policy by interfering with fundamental local police powers relating to ROW use, land use and public safety - - while accomplishing nothing other than transferring funds from already-strapped city budgets to broadband providers and their shareholders.

But the FCC has no legal authority to implement the *NOI's* proposals. That underscores Congress' wisdom in precluding a distant, unelected FCC from meddling in these critical, and intensely local, ROW and land use matters, with which the FCC has no familiarity, much less expertise.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment:	)	
Expanding the Reach and	)	
Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way	)	
and Wireless Facilities Siting	)	

COMMENTS OF THE CITY OF EUGENE, OREGON

The City of Eugene, Oregon ("City" or "Eugene"), files these comments in response to Notice of Inquiry ("*NOI*"), 26 FCC Rcd 5384, released April 7, 2011, in the above-captioned proceeding.

Eugene supports the comments of the National League of Cities, *et al.*, the comments of other Oregon local government interests, the comments of the City of San Antonio, Texas, and the comments of other local government interests filed in this proceeding. The City supplements those comments as follows.

INTRODUCTION

Eugene, with over 155,000 residents, is the second-largest city in Oregon, and home to the University of Oregon. Both landline and wireless broadband, from multiple competitive providers, are available throughout Eugene. At the same time, pursuant to Oregon law and City law, Eugene has long imposed gross revenue-based compensation requirements on private entities that install facilities in the City's rights-of-way (ROW), including ROW use by telecommunications, cable and broadband providers (among others). ROW compensation from

private sector telecom and cable providers is the fourth-largest source of City General Fund revenue, exclusive of the contribution of the City's municipal utility.

These facts lead ineluctably to two conclusions. *First*, Eugene's gross revenue-based ROW compensation requirements, as well as its ROW management practices and wireless siting zoning requirements, are *not* an impediment to broadband deployment or adoption. *Second*, any FCC action that would in any way reduce local ROW compensation requirements would have severe adverse effects on the City's budget, threatening the City's ability to provide essential public safety services to its residents. And since broadband is already universally and competitively deployed in Eugene, the effect of reducing the City's ROW compensation revenue would not be increased deployment, but simply a monetary transfer from the City and its residents to broadband providers' executives and shareholders.

Thus, even if the FCC had legal authority to adopt the various proposals set forth in the *NOI* (at ¶¶ 52-58), those proposals would not serve the broadband goals the FCC seeks to achieve. They would instead do serious damage to the fiscal health of our nation's local governments and to the integrity of local land use policy by interfering with fundamental local police powers relating to ROW use, land use and public safety.

But the FCC has no legal authority to implement the *NOI's* proposals. That underscores Congress' wisdom in precluding a distant FCC from interfering in these critical, and intensely local, ROW and land use matters, with which the FCC has no familiarity, much less expertise.

I. THE *NOI* NEGLECTS THE VITAL INTERESTS SERVED BY LOCAL RIGHTS-OF-WAY AND ZONING REQUIREMENTS.

The *NOI* (at ¶ 12) asks a wealth of questions about six "broad categories" of what it deems are the relevant "rights-of-way and wireless facilities siting issues" and how those issues "influence buildout and adoption of broadband and other communications services."

Conspicuously absent from the *NOI*, however, is any apparent interest or request for data concerning the impact that any FCC limitation on current ROW practices or land use requirements might have on local governments, their budgets, their ROW infrastructure, or local governments' residents or the neighborhoods those residents live in.

Instead, the *NOI's* focus seems to be entirely on gathering and assessing data about ROW and land use practices solely through the lens of their potential effect on the business interests of broadband and other communications service providers, largely turning a blind eye to the unique non-communications-related interests those practices may serve in each particular community, and the impact any federal interference with local ROW and zoning practices might have on local governments and the services they provide to their residents. This bias is perhaps most glaringly revealed in the description of the six "broad categories" into which the *NOI* states (at ¶12) "rights of way and wireless facilities siting issues" may be distilled – each of which is focused only on the economic interests of broadband providers and what effect local ROW and zoning practices may have on them, with *none* directed at the non-communications-related interests served by ROW or zoning requirements, and how important those requirements may be to local governments and the local residents they serve.

The *NOI's* professed concern (*id.*) about the "presence or absence of uniformity due to inconsistent or varying [ROW and zoning] practices and rates in different jurisdictions or areas" is particularly troubling. That local ROW and zoning practices may vary from local jurisdiction to local jurisdiction is neither surprising nor objectionable. Local ROW practices vary because the many factors relevant in developing such practices – topographical, soil and weather conditions; the varying nature of neighborhoods in each community; the cost of labor, materials, and real property; the economic value of the ROW to private users; municipal charter provisions;

and state law – vary considerably from community to community. Land use laws likewise necessarily vary from community to community due to such factors as the degree of diversity in types of land uses within the community, different aesthetics, types of use, and historical issues in each neighborhood within a community, and each local community's judgment about the proper balance between development and preservation. And there is nothing improper about that.

In fact, the *NOI's* apparent concern about the lack of uniformity in local ROW and land use requirements is inconsistent not only with fundamental principles of federalism, but with Congress' desire to preserve and protect local ROW and zoning authority reflected in Sections 253(c) and 332(c)(7). *See* Part V, *infra*. Eugene is therefore concerned that by asking the wrong questions, the *NOI* may generate misleading and wrong results.

II. RIGHT-OF-WAY COMPENSATION IS A CRITICAL SOURCE OF REVENUE FOR EUGENE.

Although largely ignored in the *NOI*, for many local governments across the nation, including Eugene, ROW compensation has long been and remains a crucial source of revenue, without which they could not provide the vital public services that their residents demand.

Pursuant to Oregon and City law, Eugene has long required ROW compensation fees to be paid by all private entities that use its ROW, including natural gas companies, telecommunications service providers, and cable service providers (among others). Pursuant to Eugene Ordinance No. 20083, adopted in 1997 after careful study and input from the public and industry about the issues presented by the Telecommunications Act of 1996, telecommunications service providers that own facilities in the City's ROW must pay a license fee of 7% of gross

revenues. The City's Ordinance No. 20083 ROW fees have been upheld not once, *but twice*, against §253 attack – first in Oregon state court[1] and a second time in federal court.[2]

In Eugene, total fee revenues from ROW use were approximately $6.0 million in 2010. That represents the fourth-largest source of City revenue, exclusive of the contribution of the City's municipal utility. Telecommunications service ROW fees represent about 43% of the City's total ROW fee compensation revenue.

Any loss of, or large reduction in, the City's ROW fee revenue source would have a crippling effect on the City's budget. Like other cities across the nation, Eugene has already been forced to reduce services, and eliminate jobs, as a result of declines in City revenue stemming from the prolonged economic downturn. It is important to note in this regard that the City's largest General Fund revenue source, property taxes, has been harder hit by the economic downturn than the City's ROW fee revenue source, making the relative stability of ROW fee revenues particularly crucial in these trying economic times.

Any loss of ROW fee revenues would necessarily result in a further reduction in City services to residents (also meaning further job losses), an increase in other fees or taxes, or some combination of both. City services that would have to be reduced would include police, fire and other emergency response services. Other City services that could suffer cutbacks would include a reduction in public library staff and hours; reduced parks and recreation facility availability; reductions in maintenance and improvement of City buildings and other facilities; and reduced funding for human services, such as homeless shelters.

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[1] *AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 177 Or. App. 379 (2001); *Sprint Spectrum v. City of Eugene*, 35 P.3d 327 (Or. App. 2001); *U.S. West Communications, Inc. v. City of Eugene*, 37 P.3d 1001 (Or. App. 2001), *aff'd in part and vacated in part*, 81 P.3d 702 (Or. 2003).

[2] *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002), *aff'd in part, vacated in part and remanded*, 385 F.3d 1236 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005), *on remand*, 2006 U.S. Dist. LEXIS 70763 (D. Or. Sept. 15, 2006), *appeal dismissed per stipulation*, No. 06-36022 (9th Cir. Jan. 6, 2009).

III. BROADBAND IS WIDELY AND COMPETITIVELY DEPLOYED IN EUGENE.

Eugene's ROW compensation and management practices, as well as its land use/zoning practices, have not adversely affected broadband deployment at all. To the contrary, broadband is universally, and competitively, deployed in Eugene – something that cannot be said of many rural areas in Oregon and nationwide, despite the fact that those areas almost invariably have less rigorous – and indeed, often non-existent – ROW and zoning requirements.

A. Landline Broadband.

Comcast and Qwest (now CenturyTel) have deployed broadband throughout Eugene. In addition, some CLECs also provide broadband in parts of the City as well. In fact, according to broadbandmap.gov, 100% of Eugene's population has access to landline broadband.[3] Moreover, 98.5% of Eugene's residents have access to at least two landline broadband providers, compared to only 47.7% of the population nationwide.[4] And 53.1% of Eugene's residents have access to four landline broadband service providers, compared to only 7.8% nationwide.[5]

The City's ROW policies and practices have therefore certainly been no obstacle whatsoever to broadband deployment in Eugene. To the contrary, since 1996, the City has issued 1,168 utility cut permits for the installation of telecom/broadband and related infrastructure in the City's ROW. Approximately 328 miles of such infrastructure have been installed in the City's ROW to date, and the applications continue.

B. Wireless Broadband.

The story is much the same with respect to wireless broadband in Eugene. Broadbandmap.com reveals that 75.5% of Eugene's population has access to eight or more

[3] *See* www.broadbandmap.gov/summarize/state/oregon/census-places/eugene.
[4] *Id.*
[5] *Id.*

wireless broadband providers.[6] That far exceeds the 5% of the nationwide population that has access to eight or more wireless providers.[7] The City has granted zoning applications for 194 new or upgraded wireless facilities within the 42-square mile City limits since its wireless siting ordinance was adopted in 1997.

C. Local Right-of-Way and Zoning Requirements Do Not Adversely Affect Broadband Deployment.

As both the FCC's latest *2011 Rural Broadband Report*[8] and broadbandmap.gov[9] reveal, broadband deployment and adoption in rural areas lags considerably behind broadband deployment and adoption in non-rural areas. Nationwide, only 3% of the population in non-rural areas lacks access to 3Mbps/768Kbps broadband, while 27% of the population in rural areas lacks access to such broadband.[10] In the case of wireless broadband, rural areas also lack the coverage, and the competitive alternatives, that non-rural areas enjoy.[11]

The same pattern holds true in Oregon. 97.5% of Oregon's non-rural population has access to 3Mbps/768Kbps service, while only 74.9% of Oregon's rural population does.[12]

In Oregon, as we suspect is the case in most states, ROW compensation and management requirements, as well as local land use/zoning requirements, tend to be more demanding in urban and suburban areas than in rural areas. This is due to a variety of factors – urban and suburban

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[6] *Id.*
[7] *Id.*
[8] FCC, *Bringing Broadband to Rural America: Update to Report on Rural Broadband Strategy*, GN Docket No. 11-16, at pp. 6-7 & App. B (June 17, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0622/DOC-307877A1.pdf ("*2011 Rural Broadband Report*").
[9] NTIA and FCC, *Broadband Statistics Report*, *available at* http://www.broadbandmap.gov/download/reports/national-broadband-map-broadband-availability-in-rural-vs-urban-areas.pdf.
[10] *2011 Rural Broadband Report* at 10.
[11] *See id.* at 6-7 & n.29 and *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services* (rel. June 27, 2011), FCC 11-103, at pp. 219-220.
[12] *2011 Rural Broadband Report* at App. B, p. 23.

ROW is more congested and much more valuable real estate, and cities also tend to have a far greater diversity of different types of land uses within a more confined space than rural areas. That non-rural/rural divide is unquestionably true with respect to ROW compensation, as Oregon law empowers cities to impose ROW compensation fees but does not empower counties to do so in their unincorporated areas.

Thus, in Oregon, as we suspect is true elsewhere, broadband is largely deployed in urban/suburban areas but much less widely deployed in rural areas. *Yet it is the urban/suburban areas, not the rural areas, that impose the greater ROW and local zoning requirements about which broadband providers complain.*

This fact pattern leads to two key conclusions, each of which undermines any justification for any FCC action in the areas of local ROW or zoning requirements.

First, that broadband deployment is greater – indeed, all but universal – in urban/suburban areas like Eugene with more demanding ROW compensation and zoning requirements, and much lower in rural areas despite the far more lenient, and in many cases, non-existent ROW compensation and zoning requirements in such areas, refutes any claim that local ROW compensation or zoning requirements are any significant impediment at all to broadband deployment. The primary impediment to broadband deployment is instead on the expected revenue side of broadband providers' investment decision equation: low potential subscriber density in rural areas means low anticipated revenue return per dollar of investment there.

Second, in any area like Eugene, where broadband is already ubiquitously and competitively deployed, any FCC preemption, or limitation, of local ROW compensation or zoning requirements would yield only a windfall to broadband providers and their shareholders,

at the expense of local governments and the residents they serve, with no increase in broadband deployment.

IV. THE *NOI*'S SUGGESTION THAT RIGHT-OF-WAY COMPENSATION MIGHT BE "EXCESSIVE" OR REFLECT "MARKET POWER" IS WRONG, BOTH FACTUALLY AND LEGALLY.

The *NOI* (at ¶¶ 16-20) asks several questions concerning the "reasonableness" of charges for ROW use and wireless siting. Eugene finds many of these questions troubling, primarily because they seem to be predicated on a fundamental lack of knowledge about the nature of such charges and the built-in checks and safeguards that ensure their reasonableness.

With respect to wireless siting, neither the ROW nor other City property can fairly be described as an essential facility. Eugene charges rent for wireless facilities located on City property. Most wireless facilities, of course, are located on private property, and like the City, private property owners also charge rent for wireless providers' use of their property. Thus, wireless providers have both public and private property alternatives for siting their facilities, and that constrains the rental rates any property owner may charge.

In the case of ROW use charges, the *NOI* overlooks the fundamental safeguards in place to protect against any "unreasonable" or " market power"-based ROW fees.

ROW compensation levels set by local governments are subject to the ultimate check: voters. Unlike the case with private sector actors owning essential facilities, where customers have little or no recourse in responding to excessive rates other than to forgo service, elected local government officials must be responsive to their constituents – most of whom are also paying customers of broadband and telecommunication services – in setting ROW compensation rates. Moreover, due to industry's propensity for itemizing ROW fees and all other government-related costs of doing business on their subscribers' bills, ROW fees are fully transparent to voters. If voters believe that the ROW fees their elected officials have adopted are excessive,

they have a ready remedy – the ballot box. That is a far more effective, and far more democratic, safeguard than any intrusive, preemptive action by a distant, unelected federal agency like the FCC, which has no knowledge or expertise at all about local ROW compensation.

The *NOI*'s apparent concern about local governments' possible exercise of supposed "market power" in setting ROW compensation rests on the erroneous and insulting assumption that local elected officials and staff are either ignorant of, or are not interested in, the many economic, educational, health-related and other benefits that widespread availability and adoption of broadband service can bring to their communities. Nothing could be further from the truth.

Eugene, like most municipalities, has a very significant interest in promoting the widespread availability of broadband services to its residents and businesses. The City therefore endeavors to be flexible and responsive to providers' concerns in developing and applying its ROW and land use policies, and the results speak for themselves: broadband is ubiquitously and competitively deployed in Eugene, far more so than the rest of the nation. Unlike a private sector business, the City is not a simple profit-maximizer; the City has no desire to restrict output of services to its residents to increase its revenues. A municipality does not – indeed, politically cannot – simply maximize its short-term revenues at the expense of reducing the availability of critical services like broadband to its residents and businesses. At the same time, the City does have to receive sufficient revenues to provide the public safety and other vital public services its residents demand. That is a delicate balancing process that only elected government officials should make, and not one that a single-purpose, unelected federal agency like the FCC should intrude upon or second-guess.

V. THE *NOI*'S SUGGESTION THAT THE FCC HAS AUTHORITY TO INTRUDE INTO SECTION 253(c) RIGHT-OF-WAY COMPENSATION ISSUES OR NON-RF-RELATED WIRELESS SITING MATTERS UNDER SECTION 332(c)(7) IS WRONG AS A LEGAL AND A POLICY MATTER.

The *NOI* states (at ¶¶ 51-58) that the FCC believes it has legal authority to construe, via rulemaking or otherwise, Sections 253 and 332(c)(7) to "improve rights of way and wireless facilities siting governance," and to adjudicate rights of way disputes under Section 253. The *NOI* is mistaken; Sections 253 and 332(c)(7) deny the FCC such authority.

A. The FCC Lacks Legal Authority To Engage in Rulemaking or Adjudicate Disputes Concerning Right-of-Way Compensation or Management Under Section 253.

The *NOI*'s suggestion that the FCC has authority to construe the ROW provisions of Section 253(c) via rulemaking and to adjudicate ROW disputes under Section 253(c) ignores the clear statutory language and legislative history to the contrary. Congress intended that ROW compensation and management disputes under § 253(c) were to be left to the courts, not the FCC.

1. Section 253 Does Not Apply to Non-Telecommunications Services Like Broadband.

As a threshold matter, the *NOI* overlooks that Section 253(a) only applies to state or local laws, regulations or requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service*." (Emphasis added.) Thus, on its face, Section 253(a) does *not* apply to state or local requirements that may have such an effect on the provision of *non*-telecommunications services. And broadband,

which the FCC has classified as an "information service," is just such a non-telecommunications service.[13]

Contrary to the *NOI*'s suggestion (at ¶¶ 52 & 56-58), the FCC cannot rely on § 706 or on its general authority provisions in the Act (§§ 1, 4(i), 201(b) and 303(r)) to transform § 253's language into a provision about non-telecommunications services like broadband.

As the D.C. Circuit recently made clear in *Comcast*,[14] Section 706 "does not delegate any regulatory authority" to the FCC. More fundamentally, the *NOI* makes no effort, nor is it apparent what effort would be sufficient, to stretch the FCC's Title I ancillary jurisdiction over broadband into the ability to rewrite § 253 to apply to broadband services. As was the case in *Comcast*, the *NOI* does not, and cannot, establish that its proposed extension of § 253 to broadband is "reasonably ancillary to the Commission's performance of its statutory mandated responsibilities."[15] And it would be strange, if not downright hypocritical, for the FCC to free broadband providers of the obligations of Title II by classifying their services as Title I information services while, at the same time, applying to Title I broadband providers one particular Title II provision – Section 253 – that happens to give a benefit to Title II carriers.

Moreover, any FCC effort to extend the preemption reach of § 253 beyond its text to broadband services would run afoul of yet another well-established principle: The FCC may not preempt state or local laws absent a "clear statement" in the Act granting it such authority.[16] Here, on its face, Section 253 only permits preemption in the limited circumstances set forth in § 253(a), and those circumstances are restricted to state or local requirements prohibiting the provision of "telecommunications services," which the FCC has ruled broadband services are

[13] *See, e.g.*, *NCTA v. Brand X Internet Services, Inc.*, 545 U.S. 967 (2005).
[14] *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010).
[15] *Comcast*, 600 F.3d at 644 (quoting *American Library Assn. v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).
[16] *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

not. Neither § 253 nor any other provision of the Act contains a "clear statement" granting the FCC authority to preempt local ROW requirements relating to broadband services.

2. Section 253(d) Deprives the FCC of Jurisdiction Over Section 253(c) Right-of-Way Matters.

Section 253(d) gives the FCC authority to address alleged violations of § 253(a) and (b), but *not* ROW matters under § 253(c). This was no accident or oversight. To the contrary, Section 253(d)'s omission of Section 253(c) ROW matters was the product of a compromise amendment sponsored by Senator Gorton that was explicitly designed and intended to bar the FCC from § 253(c) ROW matters.[17] "[A]ny challenge to [local ROW requirements must] take place in the Federal district court in that locality and . . . the Federal Communications Commission [should] not be able to preempt [local ROW requirements]."[18]

3. "Fair and Reasonable" Right-of-Way Compensation Under Section 253(c) Encompasses Gross Revenue-Based Compensation.

Even assuming *arguendo* that the Commission had any jurisdiction to construe § 253(c), any suggestion that "fair and reasonable" ROW compensation must be restricted, or closely related, to costs is not only at odds with § 253(c)'s language and legislature history, but also would embroil courts, the Commission, local governments and telecommunications providers in precisely the type of tedious and intrusive right-of-way compensation ratemaking proceedings that Congress intended § 253(c) to avoid.

The *NOI* makes no serious effort to assess the plain-language meaning of the phrase "fair and reasonable compensation" in § 253(c). Certainly the common and ordinary meaning of "fair and reasonable compensation" does not connote mere reimbursement of costs. *Black's Law*

[17] 141 Cong. Rec. S8213 (daily ed. July 13, 1995) (remarks of Senator Gorton).
[18] *Id.*

Dictionary at 283 (6th ed. 1991), for instance, defines the term "compensation" to mean "payment of damages; making amends; making whole; giving an equivalent or substitute of equal value . . . . Consideration or price of a privilege purchased . . . giving back an equivalent in either money which is but the measure of value . . . recompense in value." And *Black's Law Dictionary* at 277 (7th ed. 1999), defines the terms "just compensation" and "adequate compensation" for use of property as "the property's *fair market value*." (Emphasis added.)

In common parlance, "fair and reasonable compensation," means more than mere cost recovery.[19] It is difficult to believe, for example, that if a municipal government were selling a parcel of land or a vehicle, or leasing office space in a municipal building, any "compensation" the municipality receives for that property would have to be limited to, or demonstrably related to, cost recovery, rather than fair market value. Likewise, we seriously doubt that broadband providers would contend that they are entitled only to cost recovery, rather than the prices they charge, as "fair and reasonable compensation" for the services they render.

In enacting § 253(c), Congress is of course presumed to be aware of previous interpretations of similar language. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Precedent construing analogous terms fully supports the district court's construction of "compensation." The Takings Clause of the Fifth Amendment, for instance, contains the very similar phrase "just compensation." And the law is clear that the "compensation" to which a person is entitled under

[19] Although the Second Circuit suggested that the "statutory language is not dispositive," that court also observed that "payment of rent as 'compensation' for the use of property does not strain the ordinary meanings of any of the words," "commercial rental agreements commonly use gross revenue fees as part of the price term," and "Congress's choice of the term 'compensation' may suggest that gross revenue fees are permissible" under § 253(c). *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002). Moreover, the only example that *White Plains* gave for "compensation" being synonymous with costs – "'compensatory' damages in tort are designed to precisely offset the costs . . . inflicted by the tort," *id*. – actually supports our reading of "compensation," since compensatory damages clearly can include lost profits. *E.g.*, *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 918-19 (9th Cir. 2001); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 821 & n. 6 (9th Cir. 2001); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001).

the Takings Clause is not mere reimbursement of costs, but fair market value. *United States v. 50 Acres of Land,* 469 U.S. 24, 29 (1984). The law is equally clear that local governments, no less than private parties, are entitled to fair market value as "compensation" under the Takings Clause. *Id.* at 31 & n. 15.

Moreover, § 253(c) was enacted against a backdrop of abundant precedent establishing that the "compensation" to which municipalities have historically been entitled from private businesses, like telecommunications providers, that place permanent, extensive facilities in the ROW is rent in the form of franchise or license-to-use fees, which have typically been based on the franchisee's gross revenues. In the directly analogous context of cable television franchise fees, for example, the Fifth Circuit held that the 5% franchise fee permitted by 47 U.S.C. § 542 is "essentially a form of rent, the price paid to rent use of right-of-ways." *City of Dallas, Texas v. FCC,* 118 F.3d 393, 397 (5th Cir. 1997). More generally, other courts across the nation, including the Supreme Court, have consistently reached the same conclusion for over one hundred years, in the context of both local telephone and local cable television franchises.[20] Furthermore, in public and private sectors, rent charges based on a percentage of the tenant's gross revenues have long been an accepted and widely used method of calculating rent, because

[20] *E.g., City of St. Louis v. Western Union Tel. Co.,* 148 U.S. 92, 98 (1893) (franchise fee is rent for use of local rights-of-way); *City of Plano v. Public Utilities Commission,* 953 S.W.2d 416, 420 (Tex. App. 1997) (gross receipts-based franchise fee is rent for use of local rights-of-way); *City of Albuquerque v. New Mexico Public Service Commission,* 854 P.2d 348, 360 (N.M. 1993) (same); *City of Montrose v. Pub. Utilities Comm'n,* 629 P.2d 619, 624 (Colo. 1981), *related proceeding,* 732 P.2d 1181 (Colo. 1987) (same); *City of Richmond v. Chesapeake & Potomac Tel. Co. of Va.,* 140 S.E.2d 683, 687 (Va. 1965) (same); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 282 P.2d 36, 43 (Cal. 1955) (same); *Telesat Cablevision, Inc. v. City of Riviera Beach,* 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); *Group W Cable, Inc. v. City of Santa Cruz,* 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), *rehearing denied,* 679 F. Supp. 977, 979 (1988) (same); *Erie Telecommunications, Inc. v. City of Erie,* 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds,* 853 F.2d 1084 (3d Cir. 1988) (same).

gross revenue-based rent provides a reliable measure of the economic value of the leased property.[21]

Viewed, as it must be, against the plain meaning of "compensation" and the historical backdrop of gross revenue-based franchise fees as a permissible form of "compensation" for use of local rights-of-way, there is simply nothing in the language of § 253(c) (or elsewhere in the Commissions Act, for that matter) remotely suggesting that Congress intended that provision to alter historical ROW compensation methods radically, much less to upset preexisting state or local laws authorizing gross revenue-based ROW fees.

The legislative history unequivocally confirms that Congress specifically intended § 253(c) to preserve the historical practice of gross revenue-based ROW fees. The legislative history of the Barton-Stupak amendment in the House of Representatives is the key to understanding the meaning of "fair and reasonable compensation" in § 253(c).[22] And if there is one conclusion on which both the proponents *and* the unsuccessful opponents of the Barton-Stupak amendment agreed, it was that gross revenue-based fees were a permissible form of "compensation" under what is now § 253(c). The debate began with Rep. Barton, one of the amendment's sponsors, who made clear that one of the primary purposes of the amendment was to prevent the federal government from telling local governments how to set compensation levels for local rights-of-way:

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[21] *White Plains*, 305 F.3d at 77. For examples of gross receipts-based franchisee fees, *see, e.g.*, cases cited in note 20, *supra*. *See also 12 McQuillin Mun.* Corp. §34.53 at 202 (3d ed. 2006). For examples of private commercial leases where rent is based on the tenant's gross receipts, *see, e.g., Scot Properties, Ltd. v. Wal-Mart Stores, Inc.*, 138 F.3d 571, 572 (5th Cir. 1998) (construing commercial retail lease where rent is based on a percentage of lessee's gross sales); *State of Texas v. Ralph Watson Oil Co.*, 738 S.W. 2d 25, 27 (Tex. App. 1987) (evidence of sales volume can be used as a factor in determining value of land upon which business sits); *In re Peaches Records and Tapes, Inc.*, 51 B.R. 583, 590 (Bankr. 9th Cir. 1985) (percentage of gross sales is one of the means adopted by the parties to measure the rental value of the property).

[22] *See New Jersey Payphone Assn. v. Town of West New York*, 299 F.3d 235, 246-47 n.7 (3rd Cir. 2002) (relying on the Barton-Stupak floor debate to interpret § 253(c)); *White Plains*, 305 F.3d at 80 (relying on Barton-Stupak amendment's elimination of "parity" provision to construe **§** 253(c)).

> "[The Barton-Stupak amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, *but also to set the compensation level for the use of that right-of-way* . . . . The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. *The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way*."[23]

Rep. Fields then rose in opposition to the amendment, complaining that it would allow municipalities to impose on telecommunications providers what he felt were excessive gross revenue-based ROW fees in the range of "up to 11% percent."[24] The amendment's other sponsor, Rep. Stupak, replied, defending gross revenue-based fees:

> "Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it . . . . This is a local control amendment, supported by mayors, State legislatures, counties, Governors."[25]

Finally, and perhaps most revealingly, Rep. Bliley spoke in opposition to the Barton-Stupak amendment. Mr. Bliley's remarks make clear that neither the Barton-Stupak amendment, nor even the "parity language" that it replaced, was intended to preempt gross revenue-based fees:

> "I commend the gentleman from Texas [Mr. Barton], I commend the gentleman from Michigan [Mr. Stupak] who worked tirelessly to try to negotiate an agreement.
>
> The cities came back and said 10 percent gross receipts tax. Finally they made a big concession, 8 percent gross receipts tax. What we say is charge what you will, but do not discriminate. If you charge the cable company 8 percent, charge the phone

[23] 141 Cong. Record H8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton) (emphasis added).
[24] *Id.* at H8461 (remarks of Rep. Fields).
[25] *ld.* at H846l (remarks of Rep. Stupak).

> company 8 percent, but do not discriminate. That is what they do here, and that is wrong."[26]

Two conclusions are apparent: First, both proponents and opponents of the Barton-Stupak amendment agreed that the amendment permitted gross revenue-based right-of-way fees and eliminated federal second-guessing of the reasonableness of locally set fees. And second, the House certainly did not share Rep. Field's distaste for gross revenue-based fees, for after hearing his concerns, it overwhelmingly adopted the Barton-Stupak amendment by a 338 to 86 vote.[27]

In short, to construe "fair and reasonable compensation" in § 253(c) as not encompassing gross revenue-based fees would improperly subvert the clear will of Congress, as evidenced by § 253(c)'s plain language and legislative history.

B. The FCC Lacks Authority to Construe or Adjudicate the Non-RF-Related Provisions of § 332(c)(7).

As the Commission is no doubt aware, several cities argued in the *Shot Clock* proceeding, and are currently arguing in the pending appeal of the *Shot Clock Ruling*, that Section 332(c)(7)(A) and 332(c)(7)(B)(v) explicitly bar the FCC from construing, adjudicating or enforcing any of the non-radiofrequency ("RF")-related provisions of Section 332(c)(7)(B).[28] We will not repeat those arguments here, but merely incorporate by reference the Opposition and Reply Comments of the City of San Antonio, Texas, filed in the *Shot Clock* proceeding, WT Docket No. 08-165.

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[26] *Id*. (remarks of Rep. Bliley).
[27] *Id.* at H8477 (recorded vote).
[28] *See* Opposition of the City of San Antonio, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165 ("*Shot Clock* proceeding") (filed Sept. 29, 2008); Reply Comments of the City of San Antonio (filed Oct. 14, 2008); Declaratory Ruling, *Shot Clock* proceeding, 24 FCC Rcd 13994 (2009), *petitions for review pending sub nom. City of Arlington, Texas v. FCC*, No. 10-60039 (5th Cir. filed Jan. 14, 2010).

C. Even if the FCC Had Legal Authority To Construe or Enforce Section 253(c) or 332(c)(7)(B), It Would Be Unsound Policy To Do So.

Even if the FCC has the authority to construe, adjudicate or enforce Section 253(c) or 332(c)(7)(B) as the *NOI* suggests (which it does not), it would be imprudent for the FCC to do so. ROW and zoning matters are inherently fact-intensive and reflect unique local conditions and interests. In particular, ROW and zoning requirements necessarily reflect a balancing of other vital governmental interests – from public safety, to efficient transportation, to historical preservation, to the fiscal health of local governments – beyond simply promoting the widespread availability of broadband. The FCC has no expertise or understanding of, and thus no reasoned way of balancing, these interests against the interest in promoting broadband. Yet such a balancing is precisely what § 253(c) and § 332(c)(7), by their terms, require.

There simply is no "one size fits all" federal solution. That is why ROW disputes under § 253(c) and non-RF-related wireless siting disputes under § 332(c)(7) are best left to the courts. Courts are the only reviewing bodies having familiarity with all of the interests at stake, and the ability to find and weigh the specific facts of each case.

CONCLUSION

For the foregoing reasons, the Commission should find that local ROW and zoning requirements are no obstacle to broadband deployment that would justify any FCC action. After making such a finding, the Commission should terminate this proceeding.

Respectfully submitted,

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July 18, 2011

EXHIBIT E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	))))))	WC Docket No. 11-59

REPLY COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

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TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	))))))	WC Docket No. 11-59

REPLY COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

The City of San Antonio, Texas ("City" or "San Antonio"), files these reply comments in response to the opening comments filed in the Commission's Notice of Inquiry ("*NOI*"), 26 FCC Rcd 5384, released April 7, 2011, in the above-captioned proceeding.

San Antonio supports the reply comments of the National League of Cities, *et al.* (collectively, "NLC"), and the Texas Municipal League, as well as the reply comments of other local government interests filed in this proceeding. The City supplements those comments as follows.

INTRODUCTION AND SUMMARY

Opening comments opposing any preemptive or interpretive Commission action with respect to Section 253 or Section 332 (c)(7) outnumbered those favoring any such action by an overwhelming margin of about 15 to 1. As expected, industry members were the ones that urged a need for Commission action. But their arguments are flawed in several respects.

First and foremost, industry can draw no link between supposedly burdensome local right-of-way ("ROW") or zoning requirements, on the one hand, and broadband deployment, on the other. (Broadband deployment is, after all, the subject of the *NOI*.) In fact, the record

overwhelmingly and unequivocally shows there is no such link: Broadband, in both wireline and wireless forms, is widely deployed in major urban and suburban areas where ROW compensation and zoning requirements are the most rigorous, and far less deployed in more rural areas where local ROW and zoning requirements are less rigorous or even non-existent.[1] The conclusion is obvious: Any further preemption of local right-of-way compensation or zoning requirements, beyond the case-by-case court adjudication that has occurred pursuant to Sections 253 and 332(c)(7), would do nothing to promote broadband deployment in the areas that need it. It would instead merely provide one industry with favored, windfall protection from local laws with which other industries must comply, while leaving rural areas no better off in terms of broadband deployment than they are now. This same pattern – greater broadband deployment in areas with more rigorous right-of-way compensation and zoning requirements and lesser broadband deployment in areas with less rigorous right-of-way compensation and zoning requirements – also proves that other cost and demand factors play a far greater role in broadband deployment and adoption than local right-of-way or zoning requirements, and thus that the Commission would better achieve its goals by focusing on those other cost and demand factors rather than paying heed to the telecommunications industry's self-serving pleas for special and privileged protection from local laws.

Second, industry commenters offer only isolated, unverified anecdotes of supposed problems with local right-of-way or zoning requirements – an anecdotal total that, even if accepted as accurate (and as the record reveals, they are not), pales in comparison to the total number of local governments nationwide and the massive proliferation of wireless facilities and landline broadband deployment that has taken place since Section 253 and 332(c)(7) were

[1] *See, e.g.*, San Antonio Comments at 5-8; Eugene Comments at 6-9; League of Kansas Municipalities ("LKM") Comments at 6-9; Comments of National League of Cities *et al.* ("NLC Comments") at 7-16.

enacted in 1996. In short, industry commenters offer nothing to suggest that the court remedies furnished by § 253 and § 332(c)(7) have not been, and will not be, fully adequate to protect against any abuses.

Third, the anecdotes of supposed abuses that industry does provide are inaccurate or misleading – in some cases, so egregiously so as to raise a question about the industry commenters' good faith in making them.[2] In these reply comments, the City will focus only on some of industry's most egregious legal and factual claims about Sections 253 and 332(c)(7). Industry commenters take inconsistent positions about ROW compensation and local zoning requirements, and they mischaracterize the language of Sections 253 and 332(c)(7), their legislative histories, and precedent construing them. The facts and law point to but one conclusion: There is no reasoned basis for any Commission action in this proceeding.

I. THE RECORD CONFIRMS THAT RENT-BASED RIGHT-OF-WAY COMPENSATION MECHANISMS DO NOT DETER BROADBAND DEPLOYMENT AND ARE CONSISTENT WITH SECTION 253.

Industry commenters voice various complaints about supposedly "excessive" ROW fees, and some claim that Section 253 forbids all ROW fees that are not based on, or equal to, a locality's ROW maintenance costs associated with the ROW user's facilities.[3] But their claims not only fail to come to grips with the record evidence that broadband deployment is unrelated to ROW compensation;[4] they also are factually and legally flawed.

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[2] *See, e.g.*, NLC Reply Comments; Comments of the City of Wichita, Kansas; Comments of County of York, Virginia; City of Eugene, Oregon, Reply Comments.

[3] *See, e.g.*, CenturyLink Comments at 5-9; Verizon Comments at 17-21 and 24-25; Level 3 Comments at 7-14; NextG Comments at 13-16.

[4] *See* note 1 *supra*.

A. What Industry Really Wants Is Subsidized Access to Public Right-of-Way.

Industry commenters make anecdotal complaints about supposedly "excessive" ROW fees, but aside from their sporadic and largely unverified nature, these complaints are in many cases inaccurate and in many ways inconsistent. And they all ignore the over-arching fact that dooms their claims: Broadband deployment is actually greater in the major urban and suburban areas, where ROW compensation tends to be higher.[5]

CenturyLink (at 5), for instance, points to a Texas Municipal League document that states that ROW fees "constitute nearly ten percent of many Texas cities' general revenues." San Antonio agrees that ROW fees are a significant – and vitally important – source of municipal revenue.[6] But CenturyLink overlooks that in Texas, local telecommunications ROW fees are based on access lines and capped by state law.[7] More to the point, CenturyLink ignores the key fact relevant to this proceeding: Broadband deployment is high in San Antonio and other major metropolitan areas in Texas where providers pay the most in ROW fees, and low in unincorporated rural areas where no ROW fee is imposed.[8] And finally, CenturyLink overlooks the built-in check against imposition of excessive ROW fees by local governments: the voters, who see the ROW fee itemized on their bills.[9]

Industry commenters also reveal striking inconsistencies about what industry really wants when it comes to ROW compensation. Most commenters believe that predictability and

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[5] In a rational market, one would expect ROW compensation to be higher in urban and suburban markets, because ROW, like real estate, is a more valuable property there, and because labor and other input costs tend to be higher in these areas as well.

[6] San Antonio Comments at 4-5.

[7] Tex. Local Govt. Code Ann., §§ 283.001 *et seq.* (2009).

[8] San Antonio Comments at 6-8.

[9] San Antonio Comments at 10-11; Eugene Comments at 9-10; LKM Comments at 9-10. *See Charter Communications v. County of Santa Cruz*, 304 F.3d 927, 935 (9th Cir. 2002) ("methods exist to promote self-correction in the future: citizens can vote out their local representatives").

uniformity in ROW compensation across jurisdictions are most important.[10] Yet Level 3 (at 9) inconsistently complains about localities' use of "strikingly similar" ROW compensation "methodology[ies] or fee[s]."

But industry commenters also want ROW compensation to be limited to some sort of ROW cost recovery,[11] and/or to "fair market value."[12] For reasons stated elsewhere, San Antonio believes it is clear that "fair and reasonable" ROW compensation under Sections 253(c) is *not* limited to costs, and that fair market value is an appropriate measure of "fair and reasonable" ROW compensation.[13] The relevant point here, however, is that whatever may be said of cost-based ROW compensation methodologies, or of compensation methodologies based on an appraisal at the fair market value of an individual right-of-way, one thing can be said about both methods: They will *not* result in uniformity or predictability in ROW compensation from jurisdiction to jurisdiction. The reason: ROW costs and ROW appraisals will inevitably vary – and often considerably – from jurisdiction to jurisdiction, and even from street to street.[14] And using either method will impose considerable additional costs on localities and on providers to determine the appropriate, individualized costs or fair market value of the ROW.

These inconsistencies reveal that the only real common denominator in industry's position about ROW compensation is that it be minimal in amount, and/or so expensive or complicated to calculate that local governments will lack the resources to derive the evidence needed to defend the ROW fee they seek to impose.

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[10] *See, e.g.,* Verizon Comments at 39; CenturyLink Comments at 3-4; Level 3 Comments at 1 (quoting *NOI* at ¶ 4); PCIA Comments at 30-32, 48 & 57; NextG Comments at 22-23.
[11] *See, e.g.*, CenturyLink Comments at 18-20; Verizon Comments at 36-37; Level 3 Comments at 9-10.
[12] *Id.* at 10-12.
[13] San Antonio Comments at 15-19; NLC Comments at 57-60; Eugene Comments at 13-18.
[14] *See, e.g., Union Pac. Railroad Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011) (2.8 mile railroad right-of-way appraised at between $11.3 million and $30.8 million, translating into a monthly rental value of at approximately $90,000).

While industry's desire to minimize ROW compensation is understandable, it is not a principled way either to construe Section 253(c) or to promote broadband deployment.[15] Rather, it is merely a way to transfer the value of public property (the ROW) from local governments and their taxpaying residents to the shareholders and executives of ROW-using broadband providers. And since the record demonstrates that greater ROW compensation is not at all associated with lesser broadband deployment, which is the only principled basis under which ROW compensation could be relevant to the *NOI*'s broadband deployment objectives, the Commission should summarily dismiss industry's ROW compensation arguments.

B. Variable-Cost Forms of Right-of-Way Compensation, Such As Access Line-Based or Gross Revenue-Based Fees, Are Not A Cost of Broadband Deployment at All, and Actually Promote Competitive Broadband Deployment.

Industry's distaste for "revenue-generating"[16] forms of ROW compensation, such as access line-based or gross revenue-based fees, is misdirected for another reason as well. Because access line-based or gross revenue-based ROW fees are a variable cost to broadband providers, and one that is not even incurred until the provider actually is providing service, they are not a cost of broadband deployment at all. They are instead an incremental operating cost of providing broadband service, just like the broadband provider's other recurring operating costs.[17]

Moreover, as an incremental operating cost that varies with the provider's volume rather than a fixed cost or an upfront capital cost of building a broadband network, access line-based

[15] We note that, as pointed out in our opening comments (at 13-15), by its terms Section 253 does not apply to Title I broadband services, and the FCC's ability to exercise its ancillary jurisdiction to extend Section 253 to broadband is questionable at best.
[16] *E.g.*, CenturyLink Comments at 2.
[17] *See* NLC Comments at 8.

and gross revenue-based ROW fees are not only competitively neutral and non-discriminatory; they promote competition by lowering entry costs.[18]

San Antonio's compromise on the ROW compensation issue with a Distributed Antenna Service ("DAS") provider, set forth in our opening comments at 11-12, provides an example. The City originally proposed a per-foot ROW fee, but the provider preferred a gross revenue-based fee, and the City and the DAS provider agreed on the latter.

The point is, again, that industry's complaints about ROW compensation have little to do with lowering broadband deployment costs, or even promoting broadband deployment. They instead have everything to do with industry's desire for the FCC to preemptively lower one of its many operating costs, and thus to have localities and their taxpayers subsidize providers' ROW use, simply because industry (improperly) sees Section 253 as a convenient vehicle, and the FCC as a more friendly forum than courts, to do so. The Commission should spurn industry's transparent and self-serving plea.

C. Industry Misconstrues Section 253.

Industry commenters present several arguments urging that the Commission has wide-ranging authority to construe, and even to adjudicate, Section 253(c) issues. Industry further asserts that the Commission should effectively overrule the courts and construe Section 253 in a way that would remove an industry plaintiff's burden of proving a Section 253(a) "prohibition" with facts, that would affirmatively prohibit discriminatory ROW compensation or management

[18] In this respect, access line-based and gross revenue-based fees stand in stark contrast to the Communication Act's and the Commission's preferred method – auctions based on the highest, up-front, one-time bid payment – for obtaining compensation for the federal public property (the spectrum) that industry providers use. Up-front, lump-sum bidding for public property favors larger (usually incumbent) providers, and because it makes public property compensation a large, upfront fixed cost, deters competitive entry by smaller providers.

requirements without factual proof of prohibitory effect, and that would prohibit some of the very forms of ROW compensation that Congress made clear were permitted.[19]

The many legal flaws of these arguments have already been presented in our opening comments and those of others and need no repetition.[20] Here, we merely point out a few of the more glaring errors in industry's Section 253 arguments.

First, CTIA argues that the Commission should adopt, and adjudicate and enforce, a "shot clock" for the ROW permitting process under Section 253(a). The Commission may do this, according to CTIA, because it did so in the *Shot Clock Ruling*[21] under Section 332(c)(7)(B). CTIA Comments at 37-40. Even if one accepts the validity of the *Shot Clock Ruling*,[22] the shot clocks adopted there were an interpretation of the statutory phrases "reasonable period of time" in Section 332(c)(7)(B)(ii) and "failure to act" in Section 332(c)(7)(B)(v). *Shot Clock Ruling*, 24 FCC Rcd at 14008. Section 253 contains no such phrases at all. CTIA's reliance on the *Shot Clock Ruling* to graft a shot clock on to Section 253(a) is therefore entirely misplaced.

Second, industry commenters urge the Commission to construe Section 253 in ways that would stand its language and legislative history on their head. Verizon (at 34-36), for instance, argues that Section 253(a) should be construed to preempt all ROW fees that are not saved by Section 253(c) without any factual proof at all of prohibitory effect – in other words, to construe Section 253 as affirmatively prohibiting any ROW fee that is discriminatory or not competitively neutral. Level 3 claims (at 23) that the Commission has "authority to adjudicate" Section 253(c) ROW disputes. Both Verizon's and Level 3's claims would render Section 253(c) *and* (d)'s

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[19] *See, e.g.*, Level 3 Comments at 7-14 and 22-31; Verizon Comments at 25-39; CenturyLink Comments at 11-20.
[20] *See, e.g.*, San Antonio Comments at 13-19; NLC Comments at 53-66; NASUCA Reply Comments at 17-21; Eugene Comments at 11-18.
[21] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) ("*Shot Clock Ruling*"), *recon. denied*, 25 FCC Rcd 1157 (2010), *petitions for review pending sub nom., City of Arlington, Texas. v. FCC*, No. 10-60039 (5th Cir. filed Jan. 14, 2010).
[22] San Antonio does not. *See* San Antonio Comments at 20.

language, *and* their legislative histories, a nullity. By resurrecting the "parity provision" in Section 243(e) of the original House bill that would have affirmatively prohibited discriminatory ROW compensation,[23] Verizon's reading would reverse the Barton/Stupak amendment on the House floor,[24] and it would rewrite the Senate bill to include a "parity provision," when it had none.[25] Level 3's argument would do likewise, completely undoing the Gorton amendment, which was specifically intended to ensure that ROW compensation disputes take place in the courts, not before the Commission.[26]

Third, Level 3 (at 29-30 & 37) erroneously relies on the Senate floor debate on the Feinstein/Kempthorne amendment and the Gorton amendment as a reliable source for ascertaining the meaning of "fair and reasonable" ROW compensation under Section 253(c). But the Senate debate was *not* about the meaning of "fair and reasonable" compensation at all; it was about the proper forum for deciding ROW compensation disputes (and the Gorton amendment resolved that issue in favor of the courts, not the Commission).[27] The House floor debate on the Barton/Stupak amendment is the only place where the meaning of "fair and reasonable" ROW compensation was debated, and both sides agreed that rental-based ROW compensation was permitted.[28]

Fourth, Verizon (at 30-32) and Level 3 (at 6-8) suggest various ill-defined, and fact-free, ways to construe Sections 253(a)'s "effect of prohibiting" language in the context of ROW compensation. But what they do not mention is far more clear: Section 253(a)'s "prohibitory

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[23] *Compare* H.R. 1555, 104th Cong., 1st Sess., § 243(e) (1995) *with* 47 U.S.C. § 253.
[24] 141 Cong. Rec. H8460-61 (daily ed. Aug. 14, 1995).
[25] *See* S.652, 104th Cong., 1st Sess., § 201.
[26] 141 Cong. Rec. S8308 (daily ed. June 14, 1995) (remarks of Sen. Gorton). *See also BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169, 1177 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F. 3d 618 (6th Cir. 2000); *Qwest Corp. v. City of Santa Fe*, 380 F. 3d 1258 (10th Cir. 2004).
[27] 141 Cong. Rec. S8305-S8308 (daily ed. June 14, 1995).
[28] San Antonio Comments at 18-19; NLC Comments at 57-60; Eugene Comments at 13-18.

effect" language demands far more than a showing that a ROW compensation or management requirement imposes costs on a provider: If, as the Supreme Court held in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 389-90 (1999), a reduction in a telecommunication provider's profit does not necessarily "*impair*" that provider's "ability to provide service" within the meaning of a companion 1996 Act provision, 47 U.S.C. § 251 (d)(2)(B), then *a fortiori* the mere imposition of a ROW fee on a provider – particularly one that is access line-based or gross revenue-based – cannot be said to have the far more draconian effect of "*prohibiting*" that provider's ability to provide service under § 253(a).

II. THE COMMISSION SHOULD REJECT THE WIRELESS INDUSTRY'S EFFORTS TO STRETCH THE *SHOT CLOCK ORDER* BEYOND ALL RECOGNITION.

Obviously seeking to exploit the *Shot Clock Ruling* and to entice the Commission into stretching § 332(c)(7), and in some cases § 253 as well, still further beyond all recognition, numerous wireless industry commenters urge the Commission to take all manner of preemptive steps with respect to the local wireless zoning process. Even if the *Shot Clock Ruling* was within the Commission's legal authority, however (and we think it was not), the wireless industry's efforts here are a bridge much too far.

We begin with re-emphasizing what the record shows: Wireless broadband deployment, and the number of different wireless providers, is greatest in major urban and suburban areas where zoning requirements tend to be most stringent.[29] That fact alone, but especially when coupled with industry's own evidence of the mushrooming number of cell sites since § 332(c)(7)

[29] *See, e.g.*, LKM Comments at 6-9; Eugene Comments at 6-9; San Antonio Comments at 6-8.

was enacted,[30] defeats most of the wireless industry's claims here. And it underscores that the wireless industry's pleas here are less about broadband deployment than they are about industry's unsurprising, but irrelevant, preference to be freed from having to comply with local laws from which it would prefer to be exempt. The wireless industry is reduced to anecdotes, which, even if accurate, would not amount even to trees, but mere twigs, in a veritable forest of proliferating wireless sites. Certainly, wireless industry commenters offer no factual data even remotely demonstrating that the court remedy provided by § 332(c)(7)(B)(v), especially when coupled onto the *Shot Clock Ruling* (assuming *arguendo* its validity), is insufficient to deal with any problems.

But the wireless industry's renewed assault on local zoning authority suffers many other defects as well.

A. Section 332(c)(7) Is Not a Tool To Be Used By Industry or the Commission To Make Up for Siting Problems Unrelated To Local Zoning Requirements That Industry May Encounter.

AT&T candidly admits that many factors wholly unrelated to local zoning requirements frustrate or considerably delay its ability to obtain additional wireless sites. Examples include the unwillingness of landlords to lease property, landlords demanding excessive rents, and saturation of the area's suitable sites by other carriers. *See* AT&T Comments at 2-3 & 7-13. While the City understands AT&T's frustration, it does *not* accept the conclusion that AT&T seemingly seeks to draw from it: That § 332(c)(7)(B) can somehow be viewed as a conveniently manipulable device for offsetting these other problems – in other words, that local zoning authorities should be compelled to speed up their local zoning processes to "make up" for time

[30] *See, e.g.*, CTIA – The Wireless Association®, *Background on Semi-Annual Wireless Industry Survey* (2010), *available at* http.://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_Graphics.pdf (cell site growth of over 800% from 1996 to 2010).

wireless providers have lost due to unrelated site acquisition factors totally outside the locality's control. "Reasonable period of time" in § 332(c)(7)(B)(ii) is to be determined in light of the nature and scope of the wireless application and how the local zoning authority treats other similar wireless applications.[31] It is *not* to be twisted into a "changeling" shortcut to offset delays or other difficulties providers may encounter due to unwilling or overly demanding landlords of potential wireless sites.

B. Wireless Industry Commenters Improperly Construe Section 332(c)(7).

Several wireless industry commenters urge the Commission to go well beyond the *Shot Clock Ruling*.[32] Industry's proposals generally fall into the categories of allowing wireless facility modification by right, shortening the shot clocks still further for facility modification applications, and deeming applications granted if not acted on within the shot clock.[33] Even some industry commenters, however, appear to concede that at least some of these proposals are beyond the Commission's authority.[34]

And for good reason. Industry's "modification by right" proposal is, in essence, a "zero shot clock" proposal. How that can be squared with § 332(c)(7)(B)(ii)'s "reasonable period of time" language, or with the *Shot Clock Ruling*'s own explanation of that provision, "zero shot clock" proponents do not, and cannot, rationally explain.

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[31] H.R. Confer. Rep. No. 104-458 at 208 (1996), *reprinted at* 1996 U.S.C.C.A.N. 124, 223.

[32] While less clear on this point, CTIA and PCIA also appear to suggest that § 253 may provide an "alternative avenue[]" for challenging local wireless siting requirements. CTIA Comments at 37. *See also* PCIA Comments at 39-40. CTIA and PCIA are mistaken. By its clear language, § 332(c)(7)(A) precludes *any* application of § 253 to any state or local authority over decisions "regarding the placement, construction, and modification of personal wireless service facilities." Section 332(c)(7)(A) likewise bars any reliance on § 706 in the wireless siting context.

[33] *See* PCIA Comments at i and 40-43; CTIA Comments at 27 and 31-33; Verizon Comments at 10-11.

[34] *See, e.g.*, CTIA Comments at 33-34 (FCC should ask state and local authorities to "*voluntarily*" shorten the shot clock for modifications and allow certain modifications by right, and FCC should support Congressional legislation to require localities to do that).

Equally misguided is Verizon's countertextual, indeed Orwellian, proposal for the Commission to construe some kinds of wireless site modifications as not being a "modification" within the meaning of § 332(c)(7) at all.[35] The statute refers to any "modification of personal wireless facilities," *not* to a "material modification to the underlying structure."[36]

Industry proposals to further shorten the existing shot clocks in the case of modification applications miss the mark as well. Industry seems to have forgotten that the *Shot Clock Ruling* itself purported to give reasons for the length of the shot clocks it established, reasons that on their face would not justify shorter shot clocks. *See Shot Clock Ruling*, 24 FCC Rcd at 14009-14013.

Industry's suggestion that applications be "deemed granted" if not acted on before the shot clock expires suffer from the same defect. The *Shot Clock Ruling* itself states that a "deemed granted" approach would be inconsistent with Section 332(c)(7)(B). 24 FCC Rcd at 14009.

Ultimately, the wireless industry's various complaints about the treatment of wireless facilities site modification applications grossly over-generalize about what is inherently an individualized, fact-specific process. A modification of an existing facility could mean increasing its height or width, increasing wind load factors, disturbing the site's existing camouflage, or many other variables. And as noted in the City's opening comments, what an applicant sometimes refers to as a "modification" of an existing facility is really an application for a new, replacement tower, or an effort to overcome a grandfathered non-conforming use. *See* San Antonio Comments at 8-10.

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[35] Verizon Comments at 9-10.
[36] *Id.*

There simply is no "one-size-fits-all" concept of a "modification," and based on the City's experience, there certainly is not in industry's eyes, either. To be sure, municipalities typically do process most collocation applications more quickly than applications for entirely new sites. But land use law is, by its nature, a very fact-specific process, based not only on the specifics of the applicant's proposed structure but also on the surrounding area where the applicant proposes to install the structure. That is true not just in the context of wireless facilities, but in the case of all land use applications. And that is why Congress wisely left § 332(c)(7) to the courts, and why the Commission should intrude no further than it already has in the land use process.

CONCLUSION

For the foregoing reasons as set forth in the City's opening comments, as well as those set forth in other local government comments, the Commission should take no further action and terminate this proceeding.

Respectfully submitted,

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